89-298

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CHARLES DOWNING and PAUL VENERONI,
Petitioners,

v.

CITY OF URBANA, EX REL. NEWLIN, DIRECTOR OF LAW,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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113 pp

QUESTIONS PRESENTED

1. Whether an obscenity law violates the rule of *Miller v. California*, 413 U.S. 15 (1973) that the definition of obscenity must reach only those materials that depict or describe hard core sexual conduct, when such law is construed as equating sexual conduct with nudity, extreme or bizarre violence, cruelty, or brutality, or the touching of another person for the purpose of sexual arousal or gratification?

2. Whether, in applying the obscenity standards established in *Miller*, a finding that a magazine depicts or describes sexual conduct in a patently offensive way can be predicated solely on textual references therein to sexual activity and on small, isolated photographs in adjunctive advertisements in the back of the magazine in which depictions of sexual activity are obscured by black dots?

3. Whether a post-*Miller* obscenity law that defines obscenity in a manner so broad as to be completely at odds with the standards established by that case and its progeny can be salvaged from such infirmity by a judicial construction simply requiring that the law be read in pari materia with *Miller*?

> [Note: Petitioners reserve the right to argue Question 4 in the event certiorari is granted on the above questions, but do not include Question 4 among the reasons for the grant of certiorari.]

4. Whether an independent review of the record supports the findings of the courts below that the five challenged magazines are, beyond a reasonable doubt, obscene under the *Miller* standards and under the Urbana, Ohio obscenity ordinances?

LIST OF PARTIES

The parties to the proceedings below were petitioners Charles Downing and Paul Veneroni and respondent City of Urbana, Ohio by relator John C. Newlin, Director of Law for the City of Urbana, Ohio.

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The petitioners Charles Downing and Paul Veneroni respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Ohio, entered in the above-entitled proceeding on May 24, 1989.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio is reported at 43 Ohio St. 3d 109, 539 N.E.2d 140 (1989) and is reprinted in the appendix hereto, pp. 1a-34a, *infra*. The judgment entry of the Supreme Court of Ohio has not been reported. It is reprinted in the appendix hereto, p. 35a, *infra*.

The November 16, 1987 and December 8, 1987 decisions of the Court of Appeals of Champaign County, Ohio and the final entry of that Court have not been

reported. They are reprinted in the appendix hereto, pp. 36a-50a, 51a-58a, and 59a-60a, *infra*, respectively.

The Findings of Fact, Conclusions of Law, Memorandum of Decision, and Journal Entry of the Champaign County Municipal Court, Urbana, Ohio has not been reported. It is reprinted in the appendix hereto, pp. 61a-72a, *infra*.

JURISDICTION

On November 16, 1987, the Court of Appeals of Champaign County, Ohio issued a decision affirming a judgment of the Champaign County Municipal Court, Urbana, Ohio, entered against petitioners on March 20, 1987, declaring five magazines that had been sold by petitioners to be obscene under a local ordinance. See pp. 36a-50a, *infra*.

On December 8, 1987, the Court of Appeals denied a timely motion for reconsideration and entered its final judgment on that date. See pp. 59a-60a, *infra*. A timely appeal to the Supreme Court of Ohio was taken by petitioners. On May 24, 1989, the Supreme Court of Ohio issued an opinion and filed a separate judgment entry affirming the Court of Appeals' decision. See pp. 1a-34a, 35a, *infra*. Petitioners have not filed a request for a rehearing with the Supreme Court of Ohio. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED

This case involves the First Amendment to the United States Constitution, which provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." The Fourteenth Amendment to the United States Constitution is also involved. It provides in part as follows: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall

any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This case also involves obscenity ordinances promulgated by the City of Urbana, Ohio, codified as sections 133.01 through 133.015 of the Code of Ordinances of the City of Urbana, Ohio (hereinafter referred to as the "Urbana Code of Ordinances", or as the "U.C.O."). The ordinances relevant to this case are lengthy. The Supreme Court of Ohio, in an appendix to its opinion, reprinted the relevant portions. See pp. 28a-34a, *infra*. The ordinances were drafted to create a local version of Ohio's obscenity statutes, and are virtually identical to those statutes. The appendix to the Supreme Court of Ohio's opinion highlights the deviations from the Ohio obscenity statutes by bracketing the original language where appropriate. See *id.*

STATEMENT OF THE CASE

Petitioners operate a store in Urbana, Ohio under the name "Main News and Smoke Shop." On November 25, 1985, John C. Newlin, Director of Law of the City of Urbana, purchased copies of five magazines at the store. The magazines were the January, 1986 issues of *Nugget*, *Velvet* and *Juggs*, the December, 1985 issue of *Oui*, and the March, 1986 issue of *Big Boobs*. These magazines are examples of what are referred to in the publications industry as "adult sophisticate" magazines. The most well-known titles of adult sophisticate magazines are *Playboy* and *Penthouse*. Magazines of this genre generally contain erotic photographs of a woman or a man or couples in various poses, often fully nude, but avoid explicit depictions of sexual activity.

On December 3, 1985, the City of Urbana, acting through relator John Newlin, filed a complaint in the Champaign County Municipal Court seeking to have the magazines declared obscene under § 133.01(E) of the

Urbana Code of Ordinances, part of a series of obscenity ordinances that had been recently enacted by Urbana. The language of these ordinances parrots almost precisely that of Ohio's obscenity statutes.

Trial of the case to the court began on December 9, 1986. The federal questions as to which petitioners seek a review were raised in a timely and proper manner at the Municipal Court level.

Petitioners first raised the issue that forms the basis for Question 1 by means of objections to an evidentiary ruling by the Municipal Court involving the definition of "sexual conduct" to be employed in applying the second prong of the obscenity test established by this Court in *Miller v. California*, 413 U.S. 15 (1973). See pp. 73a-79a, *infra*. The ordinance at issue, as well as the Ohio statute on which it is based, contain specific definitions of "sexual conduct" and "sexual contact" that are in turn used in the definition of the word "obscene." The ordinance and the statute define "sexual conduct" as follows:

> [V]aginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal and ["or" in the Ohio statute] anal intercourse.

U.C.O. § 133.01(A), p. 28a, *infra*; Ohio Rev. Code Ann. § 2907.01(A) (Page 1987). "Sexual contact" is defined by the ordinance and the statute as follows:

> [A]ny touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

U.C.O. § 133.011(B), p. 28a, *infra*; Ohio Rev. Code Ann. § 2907.01(B) (Page 1987).

The Ohio courts had previously ruled that the Ohio obscenity statutes could be salvaged from their obvious

constitutional infirmity by a judicial construction deeming the three-part test for obscenity established by this Court in *Miller v. California*, 413 U.S. 15 (1973) to have been incorporated therein. See *State v. Burgun*, 56 Ohio St. 2d 354, 384 N.E.2d 255 (1978). Under the second prong of the *Miller* test, the challenged material or work must depict or describe "sexual conduct specifically defined by the applicable state law." *Miller*, 413 U.S. at 24. Accordingly, petitioners contended that if *Miller* was to be deemed to have been incorporated into the Urbana ordinances, the Municipal Court had to employ the ordinance's specific definition of sexual conduct. The Municipal Court rejected this contention, insisting that the definition of sexual conduct to be applied included the ordinance's definition of that phrase, combined with the ordinance's definition of "sexual contact" as well as the two examples set forth in the *Miller* decision of how state statutes might define sexual conduct. See pp. 73a-79a, *infra*.

Petitioners raised the issue forming the predicate for Question 2, which involves the application of the second prong of *Miller* to the challenged magazines, in an Answer to respondent's Complaint setting forth the defense that the magazines are protected forms of expression under the First and Fourteenth Amendments to the United States Constitution. Question 3 was also raised in petitioners' Answer, which challenged U.C.O. §§ 133.01 through 133.015 as facially unconstitutional, and in a motion to dismiss the case on this basis made at the close of respondent's case-in-chief. Among the grounds stated in support of the motion were the following:

> Furthermore, with respect to [the] argument regarding constitutionality, we would advise the Court that this ordinance was drafted after *Miller*. There was ample opportunity for city council to draft an ordinance complying with *Miller* and they failed to do that. The *Miller* case suggests that existing state

> statutes would not have to fail because of a failure to comply with *Miller*. The Supreme Court left open the question of whether subsequently drafted statutes and ordinances should keep the *Miller* standards in mind and we believe that was the requirement.

(Transcript at 182.) The motion to dismiss was overruled immediately by the Municipal Court without explanation.

On March 20, 1987, the Municipal Court issued a memorandum of decision finding the five magazines obscene. See pp. 61a-72a, *infra*. No additional elucidation of the grounds for the ruling on Question 1 was provided, although the decision expressly states that the Municipal Court did not employ the narrow definition of sexual conduct found in the ordinance in applying the second prong of the *Miller* test to the magazines. See pp. 63a, 70a, *infra*. With respect to Question 2, the Municipal Court simply found that "each of the five magazines . . . depicts or describes in a patently offensive way, sexual conduct as defined by applicable state law," without identifying the depictions or descriptions on which this finding was based. See p. 62a, *infra*. The Municipal Court made no ruling with respect to Question 3, but the decision reflects an attempt to read the ordinance in pari materia with the *Miller* decision. See pp. 64a-65a, *infra*.

A timely appeal was taken by petitioners to the Court of Appeals of Champaign County, Ohio. The federal questions presented herein were preserved on appeal by petitioners. On November 16, 1987, the Court of Appeals issued an opinion affirming the judgment of the Champaign County Municipal Court. See pp. 36a-50a, *infra*. With respect to Question 1, the Court of Appeals found that the magazines did not, "for the most part," depict "sexual conduct" as defined by U.C.O. § 133.01(A). See p. 40a, *infra*. It stated, however, that "[t]he trial judge could have authoritatively construed" the ordinance's definition of the word "obscene" by engrafting one of the

examples from *Miller* as to how a statute might define sexual conduct, viz., "lewd exhibition of the genitals" onto the definition's reference to "displays . . . of . . . nudity . . . the cumulative effect of which is a dominant tendency to appeal to prurient . . . interest . . .," and thus satisfy the second prong of *Miller*. *Id.* This resolution ignored, however, the specific definition of "nudity" found in U.C.O. § 133.01(G), p. 30a, *infra*. Question 2 was disposed of by the Court of Appeals by a finding that the magazines could have reasonably been found to contain lewd exhibition of the genitals, a finding unsupported by reference to any specific photographs. See p. 47a, *infra*. The Court of Appeals also rejected the contention advanced by Question 3 by stating that it found "no reason of constitutional dimension to preclude reading *Miller* into a post-*Miller* ordinance . . . ." See p. 50a, *infra*.

A motion for reconsideration was then filed by petitioners. The Court of Appeals overruled the motion in a decision filed of record on December 8, 1987. See pp. 51a-58a, *infra*. The Court of Appeals' final entry affirming the judgment of the Champaign County Municipal Court was filed that same day. See pp. 59a-60a, *infra*.

Petitioners timely filed an appeal with the Supreme Court of Ohio, properly preserving the federal questions raised herein. On May 24, 1989, that Court issued a decision affirming the judgment of the Court of Appeals. In addressing Question 1, the Court refused to accept the Court of Appeals' ruling that the ordinance could be authoritatively construed to have incorporated the *Miller* examples of sexual conduct into its definition of nudity for purposes of applying the second prong of the *Miller* test. It did find, however, that the definition of sexual conduct to be applied for purposes of the second prong of *Miller* included not only the ordinance's definition of "sexual conduct" but also additional unidentified "ex-

plicit examples of conduct" found in the ordinance that "constitute the sort of sexual activity that would be in accord with the second example of the second test or prong of *Miller*." See p. 16a, *infra*. By all appearances, the Court was stating that the ordinance's definition of sexual contact, "any touching of an erogenous zone of another . . . for the purpose of sexually arousing or gratifying either person," as well as other sorts of activity mentioned in the ordinance, such as nudity and extreme or bizarre violence, cruelty, or brutality, were the same sorts of conduct described in the two *Miller* examples. See pp. 14a, 16a, 24a, *infra*.

Addressing the issue that is presented herein as Question 2, the Court found that although the magazines were not of the type referred to as "explicit" in the magazine industry, they satisfied the second prong of *Miller* because they contain "either in the text, photographs, or their advertisements numerous depictions or descriptions of ultimate sexual acts, cunnilingus, fellatio, and sodomy." See pp. 18a-19a, *infra* (footnote omitted). With respect to the advertisements, the Court held that "the industry practice of publishing photographs with a small black dot obscuring the actual contact between sexual organs and various orifices does not preclude a jury from finding representations of ultimate sexual acts or display of genitals to be patently offensive." See p. 18a, *infra*.

The Court did not address the contentions that form the basis for the third federal question presented herein.

REASONS FOR GRANTING THE WRIT

I. An obscenity law violates the rule of *Miller v. California*, 413 U.S. 15 (1973) that the definition of obscenity must reach only those materials that depict or describe hard core sexual conduct, when such law is construed as equating sexual conduct with nudity, extreme or bizarre violence, cruelty, or brutality, or the touching of another person for the purpose of sexual arousal or gratification.

The decision of the Supreme Court of Ohio eviscerates with respect to Ohio citizens this Court's holding in *Miller v. California*, 413 U.S. 15 (1973) that only material that depicts "hard core" sexual conduct can be found obscene. *Id.* at 27. In *Miller*, a relatively objective standard was established for identifying hard core materials as the second prong of what has come to be known as the *Miller* test. The inquiry under this element of the test is "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law . . . ." *Id.*, at 24. The *Miller* Court provided the following examples of how a state statute could define sexual conduct for purposes of this standard:

> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

Id.

The Supreme Court of Ohio found that the U.C.O. obscenity ordinances satisfy the second prong of *Miller* because they give "explicit examples of conduct which would constitute the sort of sexual activity that would be in accord with the second example of the second test or prong of *Miller*." See p. 16a, *infra*. Those examples are not specifically identified, but it is clear that the

Court is referring to the examples found in U.C.O. § 133.01, pp. 28a-30a, *infra*, that were referred to immediately before this statement in the decision. See dissenting opinion at p. 24a, *infra*. Such examples include sexual conduct, defined as "vaginal intercourse . . ., anal intercourse, fellatio, and cunnilingus," sexual contact, defined as "the touching of an erogenous zone of another . . . for the purpose of sexually arousing or gratifying either person", and a laundry list of other examples, including nudity and extreme or bizarre violence, cruelty, or brutality. This holding renders the second prong of *Miller* virtually meaningless for Ohio citizens. For example, under the sexual contact example, a depiction of hard core sexual conduct could be found in a photograph of a fully-clothed man touching the thigh of a fully-clothed woman, if there was some indication that the man intended to sexually arouse himself or the woman thereby. In fact, the touching would not have to be of a thigh. The ordinance's open-ended description of what constitutes an "erogenous zone" for purposes of the sexual conduct definition could well apply to even more innocuous areas of the anatomy. Similarly, the "nudity" and "extreme or bizarre violence, cruelty, or brutality" examples are also totally inconsistent with the teachings of *Miller*.

Unlike the first and third prongs of the *Miller* test, which represent highly subjective standards, the second prong provides an objective threshold of protection for sexually-oriented material. Because of the second prong, a person making a decision as to whether to distribute such material should be able to discern with some confidence whether he would be in murky waters from a First Amendment standpoint in proceeding with distribution. If the material contained depictions of sexual conduct, as specifically defined by the applicable state law, and if that definition were roughly consistent with this Court's notion of what hard core sexual conduct is, as expressed in the *Miller* examples, he could be expected

to recognize that distribution carried with it the risk of prosecution.

This Court's decisions acknowledge the inherent difficulties associated with defining obscenity and applying any definition of obscenity. The second prong of the *Miller* test stands as the most important bulwark against the position that these difficulties leave the courts with no choice but to extend constitutional protection to virtually all sexually-oriented speech. See pp. 20a-27a, *infra* (dissenting opinion of H. Brown, J.) The imposition of criminal sanctions on distributors who tread across the thin line that separates protected expression from that which is unprotected can be justified only on the theory that one cannot come close to the line without knowing that he does so. *See Hamling v. United States*, 418 U.S. 87 (1974). The second prong of *Miller* is the only meaningful guarantee of such fair notice.

Given the goal of fair notice, which this Court stressed in *Miller*, the ruling of the Supreme Court of Ohio is highly disturbing for three separate reasons. First, the ruling ignores the mandate of *Miller* that the definition of sexual conduct must include only hard core sex acts. There is no question that mere nudity, for example, does not constitute sexual conduct, *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974), a proposition that the Supreme Court of Ohio itself acknowledged in text but ignored in fact, see p. 12a, *infra*. Furthermore, material containing the requisite "touching" or "extreme or bizarre violence, cruelty, or brutality" may or may not depict or describe hard core sexual conduct. Under the former, virtually any kind of touching might be proscribed, if there is evidence of an intent to sexually arouse, and the picture could be quite innocuous. The "violence, cruelty, or brutality" standard may not even involve sex. Thus, these standards are unquestionably alien to the intended scope of *Miller*'s second prong, as expressed in the *Miller* examples. As a result, Urbana, as well as the State of Ohio, by virtue of

the similarity of the laws at issue, now have the authority to ban forms of expression that this Court intended to protect when *Miller* was decided. *Miller* promised that "no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed." *Miller*, 413 U.S. at 27. Petitioners fear that under the Ohio Supreme Court's ruling, they and other Ohio citizens will not only be subject to prosecution for selling material that is not "hard core", but convicted and incarcerated for doing so.

Secondly, the Supreme Court of Ohio's adoption of this standard seriously threatens the integrity of the second prong of *Miller* as an objective threshold of protection for sexually-oriented expression. The "touching" standard is utterly bereft of meaning. The *Miller* examples are relatively straightforward: you either have the conduct described or you do not. The "touching" standard, however, requires an inquiry into the intent of the actors, to discern for example whether the stroking of a thigh is for the purpose of sexual arousal. Thus, no longer can the prospective Ohio seller rely on his eyes to determine whether he should engage in distribution; he must now analyze the motives of the actors. Virtually any publication, whether sexually oriented or not, could contain a depiction or descriptive of the requisite "touching". To impose upon the putative seller the requirement of analyzing intent with respect to all such depictions or descriptions is to discourage him from engaging in business at all, much to the ultimate harm of Ohio citizens. The inevitable chilling effect on First Amendment protections posed by the unguided guesswork the Ohio Supreme Court's ruling requires cannot be overstated.

Thirdly, the Supreme Court of Ohio arrived at the definition of sexual conduct to be applied in a wholly unprincipled fashion. In *Ward v. Illinois*, 431 U.S. 767 (1977),

this Court found that Illinois law contained a sufficiently specific definition of sexual conduct to support an obscenity conviction, even though the obscenity statute at issue was silent on that point. The holding was based on the fact that a prior Illinois Supreme Court decision had provided detailed recitations of the type of sexual conduct the description or depiction of which was banned by the statute, and on the fact that the Illinois Supreme Court must have intended, in expressly incorporating the *Miller* test into the statute, to also have incorporated the *Miller* examples to avoid a vagueness problem.

In the instant case, the Urbana law *provided* an express definition of sexual conduct, but the Supreme Court of Ohio and the two lower courts ignored that definition and instead applied three different definitions. Under the reasoning of the Supreme Court of Ohio, if an obscenity law contains a specific definition of sexual conduct, that definition can be supplanted by later judicial construction irrespective of the fair notice concerns of the *Miller* decision.

Unlike *Ward*, there was no need here to engage in such reworking of the language of the law because the specific definition of sexual conduct found in the ordinance was perfectly harmonious with the *Miller* examples. Nor was there any Ohio decision indicating the Ohio obscenity statute or the Urbana ordinance would be read this way.

The Supreme Court of Ohio's ruling in this respect ignores the clear language of *Miller* requiring that obscenity legislation clearly define the sexual conduct that cannot be depicted or described. While *Ward* modified that requirement to some extent by permitting incorporation of the *Miller* examples when the law was silent on what was being proscribed, that case in no way sanctioned the judicial rewriting of legislation that is presented here.

Plenary consideration of this case is required to prevent citizens of Urbana, and Ohio, from being subjected

to prosecution and incarceration for selling material that depicts "touching", mere nudity, or "extreme or bizarre violence, cruelty or brutality". While this has not yet occurred because this case involved only declaratory relief, this unacceptable result looms on the horizon.

II. In applying the obscenity standards established in *Miller*, a finding that a magazine depicts or describes sexual conduct in a patently offensive way cannot be predicated solely on textual references therein to sexual activity and on small, isolated photographs in adjunctive advertisements in the back of the magazine in which depictions of sexual activity are obscured by black dots.

After establishing the open-ended definition of sexual conduct to be applied in reading the ordinances in pari materia with *Miller*, the Supreme Court of Ohio proceeded to find that the magazines depict or describe sexual conduct under the narrow definition of that phrase found in U.C.O. § 133.01(A). See pp. 18a-19a, *infra*. A reading of the decision, however, makes it clear that the Supreme Court of Ohio actually applied the open-ended definition. U.C.O. § 133.01(A) requires the depiction or description of ultimate sex acts, with penetration required in the case of intercourse, but in purporting to apply this provision, the Court stated that the publishing of black dots over the critical areas of interest in depictions of sexual activity does not preclude a finding that sexual conduct has been depicted for purposes of § 133.01 (A). See p. 18a, *infra*. Given the fact that the black dots preclude a finding of penetration or other ultimate sex acts, it appears that the Supreme Court of Ohio was applying the prohibited "nudity" or "sexual *contact*" standards of sexual conduct. This is amply demonstrated by the Court's statement that the black dots would not preclude a jury from finding a *display of genitals* to be patently offensive.

Even if the Supreme Court of Ohio did actually apply the narrow definition of sexual conduct found in U.C.O. § 133.01(A), its findings conflict with those of the Court of Appeals, which stated that the magazines "for the most part" do not depict sexual conduct as defined in U.C.O. § 133.01(A), *see* p. 40, *infra*, and that the magazines are "largely free of such depictions", see p. 46a, *infra*.

This conflict is partially explainable by the Supreme Court of Ohio's position that the requirement that works be viewed "as a whole" in determining whether they are obscene does not apply with respect to the second prong of *Miller*. See p. 17a, *infra*. Under this view, the second prong of *Miller* is satisfied if the material at issue contains *any* description or depiction of sexual conduct, regardless of the number of such descriptions or depictions or their significance in relation to the material viewed as a whole. Consequently, the second prong of *Miller* is reduced to a narrow search for one objectionable description or depiction, no matter how inconsequential to the overall thrust of the material. If that description or depiction is found, no further inquiry under the second prong is required.

The limited scope of review that results from such a standard is best evidenced by the Supreme Court of Ohio's own language on the application of the second prong:

> All five magazines contain either in the text, photographs, or their advertisements numerous depictions or descriptions of ultimate sexual acts, cunnilingus, fellatio and sodomy. They therefore contain 'sexual conduct" as defined by [U.C.O.] Section 133.01(A) (R.C. 2907.01[A]).

See pp. 18a-19a (footnote omitted).

The vast majority of photographs contained in the publications at issue here reveal persons in a state of undress,

without companions, and are no more explicit than movies bearing the industry-imposed "R" rating. This fact apparently escaped the Supreme Court of Ohio's attention.

While it is true that "[a] quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication," *Kois v. Wisconsin*, 408 U.S. 229, 231 (1972) (quoted with favor in *Miller v. California*, 413 U.S. 15, 25 n.7 (1973)), the converse of this proposition must also hold true. Thus, seizure upon isolated passages or photographs to declare a publication obscene, where the preponderant theme of the material is nudity alone, can not be permitted. The isolated passages or photographs involved here do not rise to a level of patent offensiveness because they are immaterial when compared to the magazines' otherwise protected content.

Nevertheless, the Supreme Court of Ohio relied on small, isolated photographs in advertisements in the back of the magazine as support for its finding that the magazines depict sexual conduct.

Although *Miller* did not expressly state that the requirement that materials be "viewed as a whole" applies with respect to the second prong, any other position elevates form over substance. There must be a certain level of materiality to the objectionable description or depiction with respect to the material viewed as a whole, or the second prong inquiry becomes a mere technical hurdle that can be surmounted by reference to one isolated passage or picture. *See United States v. Shipment of 25,000 Magazines, Entitled "Revue"*, 254 F. Supp. 1014 (D. Md. 1966); *Leech v. American Booksellers Assoc., Inc.*, 582 S.W.2d 738 (Tenn. 1979).

Also explaining the conflict between the findings of the Supreme Court of Ohio and Court of Appeals is the former's willingness to accept mere textual references to sexual activity as sufficient to satisfy the second prong. This is what the 1986 Attorney General's Commission on

Pornography had to say about an obscenity finding predicated on the printed word:

> [W]e note that material consisting entirely of the printed word can be legally obscene, as the Supreme Court held in 1973 in *Kaplan v. California.* [413 U.S. 115 (1973)]. And we have seen in the course of our inquiries books that would meet this standard—books consisting of nothing more than descriptions of sexual activity in the most explicit terms, plainly patently offensive to the vast majority of people, and plainly devoid of anything that could be considered literary, artistic, political, or scientific value.
>
> Although many such books exist, and although they constitute part of all the categories of material we have identified, they seem to be the least harmful materials within the various categories. Because they involve no photographs, there need be no concerns with those who are actually used in the process of production. And the absence of photographs necessarily produces a message that seems to necessitate for its assimilation more real thought and less almost reflexive reaction than does the more typical pornographic item. There remains a difference between reading a book and looking at pictures, even pictures printed on a page.
>
> * * * *
>
> Some of us, however, except for material plainly describing sexual activity with minors or targeted to minors, would urge that materials consisting entirely of the printing word simply not be prosecuted at all, regardless of content. There is for all practical purposes no prosecution of such materials now, so such an approach would create little if any change in what actually occurs . . . . [F]rom this perspective, what is lost in the ability to prosecute this material is more than compensated for by the symbolic and real benefits accompanying the statement that the written word has had and continues to have a special place in this and any other civilization.

Attorney General's Commission on Pornography, Final Report, July 1986, Vol. I, pp. 382-84.

While there may be no justification for carte blanche First Amendment protection of the printed word, the Supreme Court of Ohio has, by all appearances, made the printed word synonymous with a photograph for purposes of applying the second prong. This is not at all consistent with the patent offensiveness element of the second prong, as the Attorney General's Report implicitly recognizes.

Because a determination of the merits of Question 2 necessitates a review of the materials at issue, petitioners have requested the Clerk of the Court possessed of the record to transmit the magazines at issue to the Clerk of this Court, pursuant to Rule 19.1 of the Rules of this Court. The mailing of those materials was effected on July 20, 1989.

III. A post-*Miller* obscenity law that defines obscenity in a manner so broad as to be completely at odds with the standards established by that case and its progeny cannot be salvaged from such infirmity by a judicial construction simply requiring that the law be read in pari materia with *Miller*.

The Urbana obscenity ordinances suffer serious constitutional defects beyond those pertaining to the definition of sexual conduct to be applied under them for purposes of *Miller* compliance. For example, U.C.O. § 133.01 (E) defines obscenity as follows:

> When considered as a whole, and judged with reference to ordinary adults or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to that group, any material or performance is 'obscene' if any of the following apply:
>
> (1) Its dominant appeal is prurient interest;

(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masterbation [sic], sexual excitement or nudity in a way that tends to represent human beings as mere objects of sexual appetite;

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way that inspires disgust or revulsion in persons with ordinary sensibilities without serving any genuine scientific, educational, sociological, moral or artistic purpose;

(5) It contains a series of displays or descriptions of sexual activity, masterbation [sic], sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such an interest is primarily of its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral or artistic purpose.

See pp. 29a-30a, *infra*.

The disjunctive elements of this definition are drastically in conflict with the conjunctive standards mandated by *Miller*, to-wit:

(a) Whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; *and*

(b) Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; *and*

(c) Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller, 413 U.S. at 24. For example, materials are obscene under the ordinance if, when considered as a whole, and judged with reference to ordinary adults, their "dominant appeal is prurient interest," U.C.O. § 133.01 (E) (1), a result that ignores the "contemporary community standards" element of the first prong of the *Miller* test, as well as the second and third prongs altogether.

Alternatively, materials can be found obscene under the ordinance if, when considered as a whole, and judged with reference to ordinary adults, their "dominant tendency is to arouse lust by displaying or depicting sexual activity, masterbation [sic], sexual excitement or nudity in a way that tends to represent human beings as mere objects of sexual appetite." U.C.O. § 133.01(E) (2). This conflicts ~~with~~ *Miller* in ignoring the "contemporary community standards" and "prurient interest" elements of the first prong, the "patent offensiveness" and "specific definition" requirements of the second prong, and the third prong entirely. In addition, the use of the word "lust" flouts this Court's ruling in *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985), and the prohibition of depictions or descriptions of mere nudity is a clear-cut contravention of *Miller* and its progeny.

The ordinance's ban of materials with a dominant tendency "to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality" essentially ignores *Miller* altogether. See U.C.O. § 133.01(E) (3). The balance of the definition does not fare much better in complying with the *Miller* mandates. *See* U.C.O. § 133.01(E) (4) and (5), pp. 29a-30a, *infra*.

Furthermore, the attempt to incorporate the third prong of the *Miller* standard into the ordinance as an *affirmative defense* is in obvious conflict with the *Miller* test. *See* U.C.C. § 133.012(B), p. 31a, *infra.*

The *Miller* decision was not intended to render obsolete all existing obscenity legislation. In fact, the opinion expressly states that "existing state statutes as construed heretofore or hereafter, may well be adequate. *Miller*, 413 U.S. at 24 n.6.

Both pre-*Miller* and post-*Miller* obscenity laws have been struck down under the overbreadth doctrine, however, when they present significant problems under the *Miller* standards. *See, e.g., People v. Tabron*, 190 Colo. 149, 544 P.2d 372 (1976); *State v. Wedelstedt*, 213 N.W.2d 652 (Iowa 1973); *State v. Shreveport News Agency, Inc.*, 287 So. 2d 464 (La. 1974); *Commonwealth v. Horton*, 365 Mass. 164, 310 N.E.2d 316 (1974); *ABC Interstate Theatres, Inc. v. State*, 325 So. 2d 123 (Miss. 1976); *State v. Harding*, 114 N.H. 335, 320 A.2d 646 1974); *Commonwealth v. MacDonald*, 464 Pa. 435, 347 A.2d 290 (1975), *cert. denied*, 429 U.S. 816 (1976); *Art Theater Guild, Inc. v. State ex rel. Rhodes*, 510 S.W.2d 258 (Tenn. 1974).

In *Marjak, Inc. v. Cowling*, 626 F.Supp. 522 (W.D. Ark. 1985), the court stated as follows:

> Although some statutes omitting one or two details of the *Miller* tests have been given a savings construction, . . . the omission from the ordinance of the requirement that the material depict 'hard core' sexual conduct renders it too vague and overbroad to pass constitutional muster. It would seem impossible for one to know what the limits of expression are under the ordinance. To allow this ordinance to stand could expose many to prosecution for the sale of otherwise protected materials. At the very least, it would have a significant 'chilling effect' on the exercise of certain First Amendment rights within the City of Stamps, Arkansas.

Id. at 526-27.

In *State v. Burgun*, 56 Ohio St. 2d 354, 384 N.E.2d 255 (1978), the Supreme Court of Ohio held that the Ohio obscenity statute's definition of obscenity, which is basically the same definition used in U.C.O. § 133.01(E), is not unconstitutionally overbroad as long as the *Miller* standards are incorporated therein by authoritative judicial construction. The Court specifically approved the unquestionably confusing practice of instructing the jury as to the terms of the Ohio statute and then giving a "narrowing" instruction restricting the definition of obscenity to that laid down in *Miller*. No other guidance was provided on the interaction of these conflicting standards.

In the companion cases of *Sovereign News Co. v. Falke*, 674 F.2d 484 (6th Cir. 1982) and *Turoso v. Cleveland Municipal Court*, 674 F.2d 486 (6th Cir. 1982), the United States Court of Appeals for the Sixth Circuit held that the infirmities that may exist in Ohio's definition of obscenity had been cured by the Ohio Supreme Court in its decision in *Burgun, supra.* It should be noted, however, that this holding was conditioned on the perception of at least three of the six participating judges, with one of the remaining three insisting that the statute is unconstitutional, that the definition of sexual conduct that should be applied in incorporating *Miller* into the Ohio definition was the specific definition of sexual conduct found in the statute, which requires the depiction or description of actual sex acts. See *Falke*, at 485 (Engel, J., concurring); *Turoso*, at 487 (Engel, J.). In this case, of course, the Supreme Court of Ohio specifically rejected that proposition, but still has not announced precisely what the definition is. Thus, the Sixth Circuit has not addressed the issue presented here, the constitutionality of Ohio's legislative scheme, given an open-ended definition of sexual conduct.

There is another issue distinguishing this case from these Sixth Circuit cases. Even if this Court accepts

the *Burgun* view, which involved in the view of one federal judge the performance of "radical surgery" on a "malignant" statute, *see Turoso, supra*, at 496 (Merritt, C.J., dissenting), this case presents a wholly different issue. The Ohio obscenity statute pre-dates *Miller* except for some cosmetic changes made effective January 1, 1984. Compare Ohio Rev. Code Ann. § 2907.01(F) (Page 1987), pp. 29a-30a, *infra*, with Ohio Rev. Code Ann. § 2905.34(A) (Page Supp. 1971), pp. 80a-81a, *infra*. The Urbana obscenity ordinances, on the other hand, were enacted *thirteen years* after *Miller* was decided, beyond question more than enough time for legislative bodies to have come to grips with the constitutional guarantees established by that case.

According to the Supreme Court of Ohio's ruling in this case, a legislative body is free to enact obscenity legislation that violates *Miller's* mandate as the courts will rewrite the legislation for them to bring it into compliance. This is true even if the legislation patently contravenes the First Amendment principles announced in that case. The mental gymnastics required of citizens to understand such legislation, as judicially rewritten, whether in making a decision as to what can legally be sold or as jurors in an obscenity case, is not consistent with basic notions of fairness or due process. That a "chilling effect" on First Amendment rights will result from such legislation is a foregone conclusion.

This case squarely presents the issue of whether this Court will restrain legislative bodies from ignoring the First Amendment principles it announced in *Miller*. In the absence of a contrary ruling from this Court, the Supreme Court of Ohio's decision will invite them to do just that, leaving it to the courts to engage in the unprincipled practice of deeming the law to say something totally different from what it actually says.

A government's regulation of obscenity may not be achieved "by means which sweep unnecessarily broadly

and thereby invade the area of protected freedoms." *Zwickler v. Koota*, 389 U.S. 241, 250 (1967). A more clear-cut example of such a law can hardly be imagined. Plenary consideration of this matter by this Court is essential to the preservation of *Miller* as a meaningful limitation on legislative bodies seeking to regulate obscenity and as something other than a limiting instruction given to juries as an afterthought to an instruction on a patently unconstitutional law.

CONCLUSION

For these various reasons, this petition for certiorari should be granted. Petitioners reiterate that they have not presented Question 4 as a reason for granting certiorari; they will, however, request the Court to make an independent review of the record in connection with this issue in the event certiorari is granted.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

IN THE SUPREME COURT OF OHIO

No. 88-30

CITY OF URBANA, EX REL. NEWLIN, DIR. OF LAW,
Appellee,

v.

DOWNING *et al.*,
Appellants.

Appeal from the Court of Appeals
for Champaign County, No. 87-CA-03

(Submitted February 14, 1989—Decided May 24, 1989)

Obscenity—Question of obscenity directed to each particular magazine at issue—"Average person," construed—Role of trial judge in bench trial—Opinion of lay witnesses not needed, when—Appellate procedure—Appellate court must conduct independent review of record in First Amendment case.

O.Jur 3d Criminal Law §§ 1859, 1884.

1. The determination of whether a magazine is obscene must be directed solely to each particular magazine at issue and procedural safeguards must be followed that are "designed to focus searchingly on the question of obscenity." (*Marcus* v. *Search Warrant* [1961], 367 U.S. 717, followed.)

2. In an obscenity trial, the trier of fact must determine, among other factors, whether the average person applying contemporary community standards would find that the work taken as a whole appeals to the prurient interest. The term "average person" does not include any number of people, the majority, or a few, or some, but is a term connoting a composite or synthesis of the community. (*Miller* v. *California* [1973], 413 U.S. 15, followed; *United States* v. *Treatman* [C.A. 8, 1975], 524 F.2d 320, approved.)

3. When the judge is the trier of fact in an obscenity case, he must gauge the reaction of the community when and as if the "average person" viewed the material.

4. If the material alleged to be obscene are admitted into evidence, there is no need for lay witnesses to testify on whether they think those materials are obscene. (*Paris Adult Theatre I* v. *Slaton* [1972], 413 U.S. 49, followed.)

5. An appellate court must conduct an independent review of the record in a First Amendment case. (*Bose Corp.* v. *Consumers Union of the United States, Inc.* [1984], 466 U.S. 485, followed.)

On December 3, 1985, the Director of Law of the city of Urbana brought an action for declaratory judgment in the Urbana Municipal Court pursuant to R.C. Chapter 2721, Civ. R. 57 and Section 133.014 [1] of the Urbana City Code ("U.C.C."). Plaintiff was seeking a determination that five "male sophisticate" magazines sold by the defendants were obscene. The magazines challenged are the January 1986 editions of "Juggs," "Nugget," and "Velvet"; the December 1985 edition of "Oui"; and the March 1986 edition of "Big Boobs." The defendants waived a jury trial and after three days of hearings, the

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[1] See Appendix.

trial court determined that the magazines were obscene. The court of appeals affirmed that decision.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Joseph A. Palmer, for appellee.

Michael W. Hemm, *Shulman & Hall* and *Thomas G. Kramer*, for appellants.

Paul F. Moke and *Elinor R. Alger*, urging reversal for *amicus curiae*, American Civil Liberties Union of Ohio Foundation, Inc.

WRIGHT, J. The defendants-appellants raise ten propositions of law, including challenges to the jurisdiction of the Urbana Municipal Court to rule whether the five magazines at issue are obscene. For the reasons that follow we affirm the lower court's rulings.

In their first and third propositions of law, the defendants-appellants challenge the subject-matter jurisdiction of the Urbana Municipal Court to hear this declaratory judgment action. The trial court denied defendants' motion to dismiss based upon the same arguments regarding subject-matter jurisdiction. The defendants then filed their answer and asserted counter-claims which alleged damages of fifteen thousand dollars. The counterclaims were dismissed without prejudice by the defendants before the plaintiff's answer could be filed, pursuant to Civ. R. 41(A)(1) and (C). The plaintiff in this action seeks only declaratory relief.

A municipal court is a court of record which has the power to grant declaratory relief provided it has subject-matter jurisdiction over the underlying action. R.C. 2721.02; *State, ex rel. Foreman, v. Bellefontaine Municipal Court* (1967), 12 Ohio St. 2d 26, 28, 41 O.O. 2d 159, 160, 231 N.E. 2d 70, 71; see *Ryan v. Tracy* (1983), 6 Ohio St. 3d 363, 367, 6 OBR 416, 419, 453 N.E. 2d 661,

664. R.C. 1901.18 sets forth the subject-matter jurisdiction of the municipal courts. It provides in pertinent part:

"(A) Subject to the monetary jurisdiction of municipal courts as set forth in section 1901.17 of the Revised Code, a municipal court has original jurisdiction within its territory * * *:

"(1) In any civil action, of *whatever nature or remedy*, of which judges of county courts have jurisdiction * * *." (Emphasis added.)

R.C. 1901.17, referred to above, limits the subject-matter jurisdiction to "those cases where the amount claimed by any party, or the appraised value of the personal property sought to be recovered, does not exceed ten thousand dollars. * * *"

Although defendants voluntarily dismissed their counterclaims, they argue that their damages would exceed ten thousand dollars should the plaintiff prevail and prevent the defendants from selling magazines such as those that are challenged in this action. Allegation alone is insufficient to divest a municipal court of jurisdiction based upon the amount of damages at issue unless the allegation is in a formal claim or counterclaim. Accordingly, the Urbana Municipal Court is not deprived of subject-matter jurisdiction upon this basis.

Furthermore, R.C. 1901.20(A) provides that:

"The municipal court has jurisdiction of the violation of any ordinance of any municipal corporation within its territory, * * * [exceptions omitted]. In all such prosecutions and cases, the court shall proceed to a final determination of the prosecution or case."

The action at bar does not fall within any of the exceptions set forth in R.C. 1901.20, nor does it violate any of the other general jurisdictional statutes concerning municipal courts. If the magazines challenged are de-

clared obscene, then the defendants could be subject to prosecution for the misdemeanor offense of pandering obscenity. U.C.C. Section 133.014 is virtually identical to R.C. 2907.36 in its provision that there will be only one judicial determination whether certain materials or performances are obscene. U.C.C. Section 133.014 provides in part:

"(C) An action for a declaratory judgment pursuant to division (A) of this section shall not be brought during the pendency of any civil action or criminal prosecution, when the character of the particular materials or performances involved is at issue in the pending case, and either of the following apply:

"(1) Either of the parties to the action for a declaratory judgment is a party to the pending case;

"(2) A judgment in the pending case will necessarily constitute res judicata as to the character of the materials or performances involved.

"(D) A civil action or criminal prosecution in which the character of particular materials or performances is at issue, brought during the pendency of the action for a declaratory judgment involving the same issue shall be stayed during the pendency of the action for a declaratory judgment.

"(E) The fact that a violation of sections 133.011 or 133.012 occurs prior to a judicial determination of the character of the material or performance involved in the violation, does not relieve the offender of criminal liability for the violation, even though prosecution may be stayed pending the judicial determination."

For example, if a misdemeanor prosecution for pandering obscenity is initiated first, then that proceeding will determine whether the materials or actions at issue are obscene. That prosecution would take place in municipal court. Subsection (C) precludes a collateral attack in a

declaratory judgment action. Likewise, subsection (D) provides that if a declaratory judgment action has been first initiated, then it cannot be collaterally attacked in a simultaneous proceeding. It would make no sense to allow the municipal court to determine whether material is obscene during a misdemeanor prosecution, but preclude such a determination in a declaratory judgment action. For all the above reasons, appellants' propositions of law concerning the alleged lack of subject-matter jurisdiction of the Urbana Municipal Court to hear this action are without merit.

Appellants in their seventh and eighth propositions of law assert that there is no case or controversy here, or if there is, this court should not render a declaratory judgment since it would not terminate the uncertainty or controversy giving rise to the proceeding. Appellants base this argument on the fact that a magazine is sold only for a limited period of time, and it is, in the normal course of business, removed from the market before all judicial proceedings can be terminated.

Such an argument, if accepted, would preclude a court from ever rendering a declaratory judgment as to whether a magazine is obscene. The determination of whether a magazine is obscene must be directed solely to each particular magazine at issue and procedural safeguards must be followed that are "designed to focus searchingly on the question of obscenity." *Marcus* v. *Search Warrant* (1961), 367 U.S. 717, 732. For example, "[w]hile a single copy of a book or film may be seized and retained for evidentiary purposes based on a finding of probable cause, the publication may not be taken out of circulation completely until there has been a determination of obscenity after an adversary hearing." *Fort Wayne Books, Inc.*, v. *Indiana* (1989), 489 U.S. ——, ——, 103 L. Ed. 2d 34, 51-52, 109 S. Ct. 916, 927. In other cases involving important First Amendment rights this court has held that a case or controversy is not moot

if the issues involved are "capable of repetition, yet evading review." *State, ex rel. The Repository*, v. *Unger* (1986), 28 Ohio St. 3d 418, 420, 28 OBR 472, 474, 504 N.E. 2d 37, 39; *State, ex rel. Plain Dealer Publishing Co.*, v. *Barnes* (1988), 38 Ohio St. 3d 165, 527 N.E. 2d 807, paragraph one of the syllabus. Such a situation exists here. While this proceeding can only determine whether the specific magazines at issue are obscene, and those magazines have long since been withdrawn from circulation, the rationale and the facts in this decision should provide guidance in other cases. Accordingly, this controversy is not moot and appellants' seventh and eighth propositions of law are without merit.

Appellants assert in their fourth proposition of law that the trial court erroneously admitted the testimony of plaintiff's lay witnesses in violation of Evid. R. 701, which provides:

"If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of his testimony or the determination of a fact in issue."

The wording of the Ohio rule is identical to Fed. R. Evid. 701. "The primary purpose of Rule 701 is to allow nonexpert witnesses to give opinion testimony when, as a matter of practical necessity, events which they have personally observed cannot otherwise be fully presented to the court of the jury." *Randolph* v. *Collectramatic, Inc.* (C.A. 10, 1979), 590 F. 2d 844, 846.[2] In an obscenity trial, the trier of fact must determine, among

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[2] The rule does not alter prior Ohio law. Lay witnesses are routinely allowed to give their opinion on matters such as the speed that an automobile was traveling, the weather conditions observed, or the apparent drunkenness of a person. See, generally, Annotation (1979), 44 A.L.R. Fed. 919.

other factors, whether the average person applying contemporary community standards would find that the work taken as a whole appeals to the prurient interest. *Miller* v. *California* (1973), 413 U.S. 15, 24. "[T]he term 'average person' does not include any number of people, the majority, or a few, or some, but is a term connoting a composite or synthesis of the community." *United States* v. *Treatman* (C.A. 8 1975), 524 F. 2d 320, 323. Qualitatively, the term average person does not mean the "abnormal adult of noxious tendencies or the person of defective or subnormal mentality." *State, ex rel. Beil,* v. *Mahoney Valley Distrib. Agency, Inc.* (C.P. 1962), 84 Ohio Law Abs. 427, 440, 169 N.E. 2d 48, 59. For purposes of the *Miller* test, the average person is one with average sex instincts. *Volanski* v. *United States* (C.A. 6, 1957), 246 F. 2d 842, 844.[3]

When the judge is the trier of fact in an obscenity case, the situation here, he must gauge the reaction of the community when and as if the "average person" viewed the material. *United States* v. *One Reel of 35mm Color Motion Picture Film* (C.A. 2, 1974), 491 F. 2d 956, 958. Expert testimony on community standards is not required. See *Pinkus v. United States* (1978), 436 U.S. 293, 302.[4]

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[3] For this proposition *Volanski* quoted at length from District Judge Woolsey's opinion in *United States* v. *One Book Called 'Ulysses'* (S.D.N.Y. 1933), 5 F. Supp. 182, affirmed (C.A. 2, 1934), 72 F.2d 705. The district court "Ulysses" opinion was cited by the Supreme Court in *Roth* v. *United States* (1957), 354 U.S. 476, 489, fn. 26, as a decision which applied the correct standard which the court then framed as: "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Id.* at 489. This standard was incorporated as the first of the three-part test in *Miller* v. *California* (1973), 413 U.S. 15. See *Brockett* v. *Spokane Arcades, Inc.* (1984), 472 U.S. 491, 497.

[4] A jury may well be better equipped for the task of determining contemporary community standards than a judge, since a

The United States Supreme Court has stated that if the materials alleged to be obscene are placed into evidence, they "are the best evidence of what they represent" and that expert testimony is not necessary to establish that they are obscene unless the materials are "directed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to the prurient interest." *Paris Adult Theatre I* v. *Slaton* (1973), 413 U.S. 49, 56, fn. 6 (citing *Mishkin* v. *New York* [1966], 383 U.S. 502, 508-510). If the materials alleged to be obscene are admitted into evidence, there is no need for lay witnesses to testify whether they think those materials are obscene. *Paris Adult Theatre I, supra*, at 56. See *Avery* v. *Maryland* (D. Md. 1980), 515 F. Supp. 818, 824, affirmed without opinion (C.A. 4, 1981), 661 F. 2d 917, certiorari denied (1981), 454 U.S. 1081.

We must review the trial court's decision whether to admit evidence under Evid. Rd 701 according to an abuse-of-discretion standard, which has been defined as connoting "more than an error of law or of judgment; it implies an unreasonable, arbitrary or unconscionable attitude on the part of the court." *Steiner* v. *Custer* (1940), 137 Ohio St. 448, 19 O.O. 148, 31 N.E. 2d 855, paragraph two of the syllabus.

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jury represents a cross section of a community and has a special aptitude for reflecting the view of the average person. There is a close analogy between the function of "contemporary community standards" in obscenity cases and "reasonableness" in other cases. "A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law." *Hamling* v. *United States* (1974), 418 U.S. 87, 104-105. In this case, the defendants waived their right to a jury trial.

In reaching its decision, the trial court considered the testimony of all the witnesses, their interest in the case, their bias or prejudice, and their knowledge on the subject. There is no indication that the trial court simply counted the number of witnesses, or deferred solely to the opinions of the plaintiff's witnesses who did testify, or based its decision on the theory that the community was simply against obscenity. Evid. R. 701 contemplates that the opinion testimony of the lay witness will be helpful. Undoubtedly, the trial judge thought that that was the case. Admission of such testimony was not required, but it was not an abuse of discretion to hear it. *State* v. *Loshin* (1986), 34 Ohio App. 3d 62, 67, 517 N.E. 2d 229, 234. Appellants' fourth proposition of law is overruled.

Appellants' sixth proposition of law is that the appellate court did not make an independent review of the facts. We disagree. Further, we now proceed with our own independent review which addresses the appellants' remaining arguments. Both the Ohio and the United States Constitutions protect freedom of speech.[5] "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties [of the First Amend-

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[5] Section 11, Article I of the Ohio Constitution provides:

"Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury, that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted."

The First Amendment to the United States Constitution provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

ment], unless excludable because they encroach upon the limited area of more important interests." *Roth* v. *United States* (1957), 354 U.S. 476, 484. Justice Brennan, writing for the majority in *Roth*, aptly stated that "[s]ex, a great and mysterious motive force in human life has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern." *Id.* at 487. Communication concerning sex is protected speech under the Ohio and United States Constitution *unless* that communication meets the legal standard of obscenity. The definition of obscenity is a question of law and a legal term of art. *Hamling* v. *United States* (1974), 418 U.S. 87, 118.

Obscenity is one of the categories of communication "to which the majestic protection of the First Amendment does not extend because they 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' " *Bose Corp.* v. *Consumers Union of United States, Inc.* (1984), 466 U.S. 485, 504 (quoting *Chaplinsky* v. *New Hampshire* [1942], 315 U.S. 568, 572).

However, courts have had great difficulty dealing with the persistent problems of defining obscenity. Justice Brennan, the author of the majority opinion in *Roth*, now maintains that no formulation adequately distinguishes obscene material from that protected by the First Amendment.[6] Several state supreme courts have turned

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[6] See Justice Brennan's dissent in *Paris Adult Theatre I* v. *Slaton* (1973), 413 U.S. 49, 73. In 1970, the President's Commission on Obscenity and Pornography recommended that laws regulating adults' access to sexually explicit materials be repealed. See Justice Steven's dissent in *Ft. Wayne Books, Inc.* v. *Indiana* (1989), 489 U.S. ——, ——, 103 L. Ed. 2d 34, 56-57, 109 S. Ct. 916, 931-932, fn. 1. The 1986 Attorney General's Commission on Pornography did not agree with this recommendation, but it did

to the unique provisions of their state constitutions to hold that no law can prohibit, punish or censor "obscene" speech "in the interest of a uniform vision on how human sexuality should be regarded or portrayed." *State* v. *Henry* (1987), 302 Ore. 510, 525, 732 P. 2d 9, 18; *State* v. *Kam* (Hawaii 1988), 748 P. 2d 372. This court does not see any impediment in the Ohio Constitution to regulating communication that meets the legal definition of obscenity. The citizens of Ohio, and in this case, Urbana, through its elected city council, have manifested a strong desire that obscenity be regulated. Our role is to ensure that that regulation meets constitutional muster.

An appellate court must conduct an independent review of the record in a First Amendment case "to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." *Bose, supra,* at 505. In an obscenity case, what appeals to "prurient interest" and what is "patently offensive" are essentially questions of fact. *Miller, supra,* at 30. However, the jury or the trial court does not have unbridled discretion to determine these factual questions. They are confined to assessing whether materials depicted or described are "patently offensive 'hardcore' sexual conduct." *Id.* at 27. No one is to be prosecuted for depicting or describing mere nudity. *Jenkins* v. *Georgia* (1974), 418 U.S. 153, 161 (reversing the Supreme Court of Georgia's affirmance of a jury's finding that the movie "Carnal Knowledge" was obscene).

The Urbana ordinances dealing with obscenity are nearly identical to the obscenity statutes, R.C. 2907.01

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state that "we recognize that the bulk of the scholarly commentary is of the opinion that the Supreme Court's resolution of and basic approach to the First Amendment issues is incorrect." 1 Attorney General's Commission on Pornography, Final Report (July 1986) 260-261.

and 2907.31 *et seq.*[7] In *State* v. *Burgun* (1978), 56 Ohio St. 2d 354, 10 O.O. 3d 485, 384 N.E. 2d 255, this court held that the then current and nearly identically worded statute defining obscenity, R.C. 2907.01(F), must be read *in pari materia* with the requirements of *Miller* v. *California*, *supra*, since the requirements and examples in *Miller* are substantive constitutional law of First and Fourteenth Amendment magnitude. *Hamling*, *supra*, at 114. In accordance with such a synthesis the definition of obscenity in R.C. 2907.01(F) was held to be neither unconstitutionally overbroad nor void for vagueness. *Burgun*, *supra*; *Turoso* v. *Cleveland Municipal Court* (C.A. 6, 1982), 674 F.2d 486, certiorari denied (1982), 459 U.S. 880. The same incorporation analysis which was followed in *Burgun* and approved in *Turoso* for R.C. 2907.01(F) applies with equal force to the current Urbana ordinance, U.C.C. Section 133.01(E).

The *Turoso* court set forth its analysis of how the *Miller* standard and the Ohio statute would interact. However, since there is some overlap between the provisions of the Urbana ordinance, the Ohio statute and the requirements of *Miller*, this opinion will set forth the analysis in an order different from that in *Turoso*, but will reach the same conclusion. The first step, and the one that is easiest to start with because of its objective nature, is to focus on the conduct requirement set forth in the second of the three guidelines in *Miller*, that is, whether the material or work "depicts or describes, in a patently offensive way, the sexual conduct specifically defined by the applicable state law * * *." *Miller*, *supra*, at 24.

The *Miller* court went on to give two "plain examples" of what could be defined by state statute as sexual conduct:

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[7] See Appendix.

"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

"(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Miller, supra,* at 25.

Those two examples are not exhaustive but indicative of the character of the acts which are subject to regulation. *Ward* v. *Illinois* (1977), 431 U.S. 767, 773; *Janicki* v. *Pizza* (C.A. 6, 1983), 722 F.2d 1274, 1276 (construing as constitutional the Toledo municipal ordinances which included the *Miller* examples of sexual conduct in addition to other examples of sexual conduct). The community standards determine if the descriptions or depictions of sexual conduct go so far beyond the customary limits of candor that they are patently offensive.

U.C.C. Section 133.01 parallels R.C. 2907.01 and provides the following definitions:

"(A) 'Sexual Conduct' means vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal and anal intercourse.

"(B) 'Sexual Contact' means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

"(C) 'Sexual Activity' means sexual conduct or sexual contact, or both."

After ascertaining whether the material, work, or performance concerns the sexual conduct defined by state or local ordinance which in turn is limited to the same sort of, but not necessarily the exact, conduct set forth in the two *Miller* examples, the trier of fact should then address

whether the first prong of the *Miller* test is met, that is, whether " 'the average person applying contemporary community standards,' would find that the work, taken as a whole, appeals to the prurient interest." *Miller, supra,* at 24.

A "pruient" interest is not the same as a candid, normal or healthy interest in sex, rather it is a " 'shameful or morbid interest in nudity, sex, or excretion * * * [which] goes substantially beyond customary limits of candor in description or representation of such matters * * *.' " *Roth* v. *United States, supra,* at 487, fn. 20 (quoting the definition of the A.L.I. Model Penal Code, Section 207.10(2) [Tent. Draft No. 6, 1957]). U.C.C. 133.01(E) gives five definitions of when any material or performance is obscene, as follows:

"When considered as a whole, and judged with reference to ordinary adults or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to that group, any material or performance is 'obscene' if any of the following apply:

"(1) Its dominant appeal is prurient interest;

"(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masterbation [*sic*], sexual excitement or nudity in a way that tends to represent human beings as mere objects of sexual appetite;

"(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

"(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way that inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral or artistic purpose;

"(5) It contains a series of displays or descriptions of sexual activity, masterbation[*sic*], sexual excitement,

nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such an interest is primarily of its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral or artistic purpose."

The U.C.C. ordinance incorporates the first and third tests of *Miller*. It also gives some additional explicit examples of conduct which would constitute the sort of sexual activity that would be in accord with the second example of the second test or prong of *Miller*.

The third prong of the *Miller* test requires the material, work, or performance be such that when "taken as a whole, it lacks serious literacy, artistic, political, or scientific value." *Miller, supra*, at 24.

This third prong is not to be determined by a reference to community standards, in this case Champaign County. "The proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole." (Footnote omitted.) *Pope* v. *Illinois* (1987), 481 U.S. 497, 500-501.

A magazine must be looked at as a whole and not as a series of "works" resulting in a "volume." *Penthouse Internatl. Ltd.* v. *McAuliffe* (C.A. 5, 1980), 610 F.2d 1353, 1367, certiorari dismissed (1980), 447 U.S. 931. The Supreme Court first used the "taken as a whole" requirement as a substitute for the "isolated excerpt approach" in the 1957 *Roth* decision. *Roth, supra*, at 488-489. The inclusion of serious literary matter in significant proportions may preclude a finding that a magazine is obscene even though the magazine contains items, photographs for example, which standing alone would be found obscene under the *Miller* test. *Penthouse* v. *Mc-*

Auliffe, supra, at 1372. However, a quantitative counting of material is not the test. In *Ginzburg* v. *United States* (1966), 383 U.S. 463, the Supreme Court affirmed a conviction wherein the trial court had determined that only four of fifteen articles in a particular magazine were obscene. The Supreme Court did not address the specific articles but based its decision upon the magazine's "characteristics as a whole, including [its] editorial formats, and not upon particular articles contained, digested, or excerpted in [it]." *Id.* at 466, fn. 5. The "taken as a whole" requirement is part of the first and third prongs of the *Miller* test.

A magazine may contain explicit sexual conduct subject to prohibition under the second requirement of *Miller*, and a trier of fact may determine that the average person in that community would find that the magazine as a whole appeals to the prurient interest, and that characteristic is the principal appeal of the material. Nevertheless, the magazine would not be legally obscene if, under the objective third prong of *Miller*, the trier of fact also concluded that a reasonable person could find "serious literary, artistic, political, or scientific value." The only exception is when there is a sham attempt to insulate obscene material with non-obscene material. If the intent is to appeal to prurient interest then the mere insertion of other matter, irrelevant to the predominant theme of the material, will not prevent a determination that the material is obscene. "This would occur, for example, if the most obscene items conceivable were inserted between each of the books of the Bible." *Penthouse* v. *McAuliffe, supra*, at 1368.

The requirements of *Miller* are cumulative and mandatory. They provide the analytical screen through which all challenged material must be filtered. If the Urbana ordinances defining obscenity and sexual conduct are construed in light of the requirements of *Miller*, they are

constitutional as are the parallel Ohio statutes. *Burgun; Turoso, supra.*

We now turn to the challenged magazines.

The trial court ruled that Dr. Joe Scott, an assistant professor of sociology, was qualified as an expert in human sexuality, sociology and obscenity. Dr. Scott testified that all five magazines are considered in the magazine publishing trade as "male sophisticate" magazines as opposed to "explicit" magazines. The difference between the two categories is that explicit magazines show actual penetration, *i.e.*, "there is nothing left to the imagination." Dr. Scott testified that industry records show that approximately nine thousand adult male sophisticate magazines are sold each year in Champaign County. Within the "adult male sophisticate" category, there is a range of content, as is demonstrated by the exhibits.

Courts are not bound by the magazine industry's determination of what is "explicit." *Miller, supra,* at 25 states that "[p]atently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or *simulated*" (emphasis added) may be subject to prohibition. The U.C.C. sections do not require that actual penetration be shown in order to find material obscene provided that all the other criteria are met. We hold that actual penetration need not be shown in a photograph, for example, before the second test in *Miller* is satisfied. Accordingly, we hold that the industry practice of publishing photographs with a small black dot obscuring the actual contact between sexual organs and various orifices does not preclude a jury from finding representations of ultimate sexual acts or display of genitals to be patently offensive.

All five magazines contain either in the text, photographs, or their advertisements numerous depictions or descriptions of ultimate sexual acts, cunnilingus, fellatio

and sodomy.[8] They therefore contain "sexual conduct" as defined by U.C.C. Section 133.01(A) (R.C. 2907.01[A]). Furthermore, the trial court and the court of appeals determined that the average person of Champaign County applying the contemporary standards of that community would find that each magazine as a whole appeals to the prurient interest. We do not disagree with that assessment. Finally, neither the magazines themselves nor anything else in the record provides any basis to suggest that any reasonable person would find serious literary, artistic, political or scientific value in any of the magazines when taken as a whole. We do not discern any such value.

Accordingly, the judgment of the court of appeals is affirmed and the plaintiff is granted the declaratory relief he requests: the January 1986 editions of "Juggs," "Nugget," "Velvet"; the December 1985 edition of "Oui"; and the March 1986 edition of "Big Boobs" are legally obscene under the Urbana ordinances.[9]

Judgment affirmed.

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[8] Such activity has been held by other courts to be the sort of "hard core" sexual conduct which is subject to regulation under state and local law. *State* v. *Han* (1981), 63 Hawaii 418, 629 P.2d 1130; *Sedelbauer* v. *State* (Ind. 1981), 428 N.E. 2d 206, certiorari denied (1982), 455 U.S. 1035; *B & A Co.* v. *State* (1975), 24 Md. App. 367, 330 A.2d 701; *People* v. *Ridens* (1972), 51 Ill. 2d 410, 282 N.E. 2d 691, certiorari granted (1973), 413 U.S. 912, affirmed on rehearing (1974), 59 Ill. 2d 362, 321 N.E. 2d 264, certiorari denied (1975), 421 U.S. 993.

[9] While the application of the *Miller* standards to the Urbana ordinances and Ohio statutes may be somewhat awkward, a defendant does have sufficient knowledge of the legal status of material to avoid prosecution. As the then Justice Rehnquist stated in the obscenity case of *Hamling* v. *United States* (1974), 418 U.S. 87, 124 (quoting *United States v. Wurzbach* [1930], 280 U.S. 396, 399):

"'Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk.'"

MOYER, C.J., HOLMES and RESNICK, JJ., concur.

DOUGLAS, J. concurs in the judgment and paragraphs two, three, four and five of the syllabus.

SWEENEY and H. BROWN, JJ., dissent.

DOUGLAS, J., concurring in judgment. I concur in the judgment and paragraphs two, three, four and five of the syllabus. I express concern that paragraph one of the syllabus is restrictive to the point that it will make it difficult—if not impossible—for cities to deal, in any meaningful way, with the ever-increasing problem of obscenity.

H. BROWN, J., dissenting. I dissent because I am convinced that sexually oriented expression should be protected under the First and Fourteenth Amendments to the Constitution of the United States and especially under Section 11, Article I of the Ohio Constitution, unless it is established that the material at issue causes harm.

In *Roth* v. *United States* (1957), 354 U.S. 476, 484, the majority stated:

"All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance * * *" (Footnote omitted.)

Yet even in *Roth*, the court stressed that "sex and obscenity are not synonymous." *Id.* at 487. Thus sexually oriented matter which was not obscene had the full protection of the Constitution. *Roth* struggled to devise a test to distinguish constitutionally protected from unprotected sexual expression. Courts have continued to wrestle with these determinations for three decades, vari-

ously modifying the test, substituting new terms for old and even reversing some former declarations. These efforts have created a hopelessly muddled and confused body of law which provides little guidance to courts and fails to give notice to distributors and publishers as to what material may be outside constitutional protection.[10]

One of the problems is that state efforts to ban obscenity have rested upon an unproven premise. The premise is that viewing sexually oriented material contributes to an increase in crime. This has not been established. Indeed, the opposite conclusion was reached in 1970 by the Commission on Obscenity and Pornography, which was established by Congress to study and determine the actual effects of pornography upon persons exposed to it. The commission stated:

"In sum, empirical research designed to clarify the question has found no evidence to date that exposure to explicit sexual materials plays a significant role in the causation of delinquent or criminal behavior among youth or adults. The Commission cannot conclude that exposure to erotic materials is a factor in the causation of sex crime or sex delinquency." (Footnote omitted.) Report of the Commission on Obscenity and Pornography (1970) 27 (hereinafter "Report of the Commission"); See, also, R. Holmes, The Sex Offender and the Criminal Justice System (1983) 118-120.

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[10] Justice Brennan has reached a similar conclusion. He stated that "the concept of 'obscenity' cannot be defined with sufficient specificity and clarity to provide fair notice to persons who create and distribute sexually oriented materials, to prevent substantial erosion of protected speech as a by-product of the attempt to suppress unprotected speech, and to avoid very costly institutional harms." *Paris Adult Theatre I* v. *Slaton* (1973), 413 U.S. 49, 103 (Brennan, J., dissenting). He observed that the members of the court had been unable to reach a consensus concerning obscenity and had been reduced to performing a case-by-case analysis. *Id.* at 84-85.

The commission further noted that: "[o]n the positive side, explicit sexual materials are sought as a source of entertainment and information by substantial numbers of American adults. At times, these materials also appear to serve to increase and facilitate constructive communication about sexual matters within marriage. The most frequent purchaser is a college-educated, married male, in his thirties or forties, who is of above average socio-economic status. Even where materials are legally available to them, young adults and older adolescents do not constitute an important portion of the purchasers of such materials." Report of the Commission at 53. Other possible positive effects of pornography are that it may have therapeutic and educational value and that it may, for certain individuals, have a cathartic effect. Downes, The Attorney General's Commission and the New Politics of Pornography, 1987 American Bar Found. Research J. 641, 671-674.

Another difficulty in the obscenity case law lies with the application of terms such as "prurient interest," "patently offensive," "contemporary community standards," "serious literary, artistic, political, or scientific value," and the ultimate in colorful nonsense, "I know it when I see it." [11] How can what lies inexpressibly buried within the subjective eyes of one supreme court justice guide any court or legislature where a determination of First Amendment limits must be made?

In the present case, the majority has fastened its analysis to another of these meaningless phrases. "For purposes of the *Miller* test," the majority says, "the average person is one with average sex instincts." How, one wonders, does the majority, or any judge identify this mythical person of "average sex instincts"? If the majority really means "average," what is the universe

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[11] *Jacobellis* v. *Ohio* (1964), 378 U.S. 184, 197 (Stewart, J., concurring).

of instincts to be averaged and what is the process by which that can be accomplished? To look critically at the language used in this and other obscenity cases is to see absurdity.

What appeals to one person may offend another. Each individual's experiences and values will shape his opinion of what has merit, is patently offensive or is simply worthless but not obscene. This inherent subjectivity makes uniform analysis and application of the obscenity standard impossible. The commission recognized the subjective nature of the inquiry when it described responses to sexually oriented materials and whether the material was likely to be labeled obscene or pornographic:

"Extremely varied responses to erotic stimuli occur in the judgmental realm, as, for example, in the labeling of material as obscene or pornographic. Characteristics of both the viewer and the stimulus influence the response: For any given stimulus some persons are more likely to judge it 'obscene' than are others; and for persons of a given psychological or social type, some erotic themes are more likely to be judged 'obscene' than are others. In general, persons who are older, less educated, religiously active, less experienced with erotic materials, or feel sexually guilty are most likely to judge a given erotic stimulus 'obscene.' There is some indication that stimuli may have to evoke both positive responses (interesting or stimulating), and negative responses (offensive or unpleasant) before they are judged obscene or pornographic." Report of the Commission at 26.

The commission noted also that individuals who want the most restriction on the availability of sexually oriented material tend to believe that others in the community agree, *whether or not this is true. Id.* at 33. Thus, the finding that certain material is obscene, based upon the testimony of a handful of community residents who testified that, in their opinion, the material is obscene

and that others in the community hold this view, is without a solid base.

A further problem is presented by the Urbana ordinance and other similar attempts to codify a definition of obscenity. Sexual conduct, under the Urbana ordinance, is broadly defined to include ordinary intercourse and even "touching of an erogenous zone of another." If such material arouses lust or appeals to the prurient interest, it may be banned. The problem is this. Sexual depiction which arouses lust is *not* necessarily obscene—even if obscenity is measured by an aesthetic or a dictionary definition. A statute does violence to the right of free expressions under the Ohio Constitution and under the First Amendment when that statute is so murky that it operates to indiscriminately ban sexual depiction which arouses lust.

It is time to re-examine the application of the First Amendment and Section 11, Article I of the Ohio Constitution to obscenity cases. The harm caused by the expression under consideration should be the focus. Such a focus fits into a long-standing approach to First Amendment problems. One enjoys free speech, yes, but one may not shout "fire in a crowded theater.[12]

There are types of sexually explicit material which cause harm. Two examples are publications which utilize minors and publications which require the commission of a crime in order to produce them.[13]

Unlike the unproven effect of viewing pornography on the crime rate, there is evidence that the use of children in pornographic films and magazines injures their physical and psychological well-being. It has been determined that sexually exploited children are unable to develop

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[12] *Schenck* v. *United States* (1919), 249 U.S. 47, 52.

[13] The most blatant example is the so-called "snuff" movie in which one or more of the actors is actually killed.

healthy relationships in later life and that such children also tend to become sexual abusers as adults. *New York v. Ferber* (1982), 458 U.S. 747, 757-764. Thus, the state has a legitimate compelling interest in protecting children from sexual exploitation. The state may prevent the distribution and possession of child pornography as well as its production, because it is extremely difficult to stop child pornography at the production stage. *Ferber* at 759-61; cf. *State v. Young* (1988), 37 Ohio St. 3d 249, 525 N.E. 2d 1363; *State v. Meadows* (1986), 28 Ohio St. 3d 43, 28 OBR 146, 503 N.E. 2d 697.

Another potential exception to the First Amendment is extremely violent sexually oriented material. Studies performed since 1970 indicate that material which combines sexually explicit depictions with extreme violence is correlated with aggressive attitudes and aggressive behavior against women, in a laboratory setting. Downs, *supra*, at 658, 677-679, and studies cited therein. Thus, the state could, based upon sufficient evidence, regulate sexually oriented material which contains graphic violence.[14]

Restricting the audience for certain kinds of material may also be defensible. It is not my purpose to catalog the types of "harm" that would take a publication out from under constitutional protection. Moreover, those determinations should first be made by the legislature. Such determinations may change and evolve in relation to the study and knowledge of the relationship between suspect material and harm. My point is that the law should be looking for the existence of "harm," not trying to define "obscenity."

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[14] Conceivably, a carefully crafted regulation could also encompass so-called "slasher films" (which frequently are "R" rated) so long as they contain the elements of patent violence and sexual explicitness, in addition to extremely violent hard core pornography. See Downs, *supra*, at 677; see, also, footnote 168 for a suggested definition of this exception.

If viewing sexually oriented materials does not cause criminal behavior or harm and if criminal behavior is not required to produce the material, what is left? The residue are materials which offend some people—people who can choose to avoid them.

In the case before us, no pernicious effect has been established with regard to the material. What has been shown is that the material is tasteless, designed to stimulate prurient interest, and, in a dictionary sense, is obscene. It is, in short, garbage. But, as Justice William O. Douglas has observed:

"* * * The First Amendment was designed to 'invite dispute,' to induce 'a condition of unrest,' to 'create dissatisfaction with conditions as they are,' and even to stir 'people to anger.' *Terminiello* v. *Chicago* [1949], 337 U.S. 1, 4. The idea that the First Amendment permits punishment for ideas that are 'offensive' to the particular judge or jury sitting in judgment is astounding. No greater leveler of speech or literature has ever been designed. To give the power to the censor, as we do today, is to make a sharp and radical break with the traditions of a free society. *The First Amendment was not fashioned as a vehicle for dispensing tranquilizers to the people.* Its prime function was to keep debate open to 'offensive' as well as to 'staid' people. The tendency throughout history has been to subdue the individual and to exalt the power of government. The use of the standard 'offensive' gives authority to government that cuts the very vitals out of the First Amendment. As is intimated by the Court's opinion, the materials before us may be garbage. *But so is much of what is said in political campaigns, in the daily press, on TV, or over the radio.* By reason of the First Amendment—and solely because of it—speakers and publishers have not been threatened or subdued because their thoughts and ideas may be 'offensive' to some." (Emphasis added; footnote

omitted.) *Miller* v. *California* (1973), 413 U.S. 15, 44-45 (Douglas, J., dissenting).

The rights afforded by the Ohio Constitution are more specific and plainly authorize the expression of *any* sentiment on *any* subject so long as the expression does not cause harm. Section 11, Article I of the Ohio Constitution of 1851 provides in part:

"Every citizen may freely speak, write, and *publish his sentiments on all subjects*, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. * * *"[15] (Emphasis added.)

I am disappointed that this court, which has almost without exception championed the press in First Amendment cases involving defamation and in cases involving access to public records, fails to recognize that constitutional rights are not solely for the protection of the popular and the influential. Accordingly, I dissent.

SWEENEY, J., concurs in the foregoing dissenting opinion.

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[15] The majority dismisses the Ohio Constitution with the observation, "This court does not see any impediment in the Ohio Constitution to regulating communication that meets the legal definition of obscenity."

APPENDIX

The Urbana ordinances are, with a few exceptions, nearly identical to Ohio statutes: The definitions set forth in U.C.C. Section 133.01 parallel those in R.C. 2907.01, except that the definitions of "prostitute," "spouse" and "minor" are not found. U.C.C. Section 133.01 provides (Revised Code language is in brackets):

"As used in sections 133.011 [2907.01] through 133.015 [2907.37] of the Code of Ordinances of the City of Urbana [Revised Code]:

"(A) 'Sexual Conduct' means vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal and [or] anal intercourse.

"(B) 'Sexual Contact' means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

"(C) 'Sexual Activity' means sexual conduct or sexual contact, or both.

"[(D) 'Prostitute' means * * *.]

"(D) [(E)] Any material or performance is 'harmful to juveniles,' if it is offensive to prevailing standards in the adult community with respect to what is suitable for juveniles, and if any of the following apply:

"(1) It tends to appeal to the prurient interest of juveniles;

"(2) It contains a display, description, or representation of sexual activity, masterbation [masturbation], sexual excitement, or nudity;

"(3) It contains a display, description, or representation of bestiality or extreme or bizarre violence, cruelty, or brutality;

"(4) It contains a display, description, or representation of human bodily functions of elimination;

"(5) It makes repeated use of foul language;

"(6) It contains a display, description, or representation in lurid detail of the violent physical torture, dismemberment, destruction, or death of a human being.[;]

"(7) It contains a display, description, or representation of criminal activity that tends to glorify or glamorize the activity, and that, with respect to juveniles, has a dominant tendency to corrupt.

"(E)[(F)] When considered as a whole, and judged with reference to ordinary adults or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to that group, any material or performance is 'obscene' if any of the following apply:

"(1) Its dominant appeal is [to] prurient interest;

"(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masterbation [masturbation], sexual excitement[,] or nudity in a way that tends to represent human beings as mere objects of sexual appetite;

"(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

"(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way that inspires disgust or revulsion in persons with ordinary sensibilities without serving any genuine scientific, educational, sociological, moral[,] or artistic purpose;

"(5) It contains a series of displays or descriptions of sexual activity, masterbation [masturbation], sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such an interest is primarily of its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral or artistic purpose.

"(F) [(G)] 'Sexual excitement' means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

"(G) [(H)] 'Nudity' means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernible turgid state.

"(H) [(I]) 'Juvenile' means an unmarried person under the age of eighteen.

"(I) [(J)] 'Material' means any book, magazine, newspaper, pamphlet, poster, print, picture, figure, image, description, motion picture film, phonographic record or tape, or other tangible thing capable of arousing interest through sight, sound, or touch.

"(J) [(K)] 'Performance' means any motion picture, preview, trailer, play, show, skit, dance, or other exhibition performed before an audience.

"[(L) 'Spouse' means * * *.]

"[(M)] 'Minor' means * * *.]"

U.C.C. Section 133.011 [R.C. 2907.31] is omitted because it is not relevant to this decision. U.C.C. Section 133.012, pandering obscenity, parallels R.C. 2907.32 and provides:

"(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

"(1) Create, reproduce, or publish any obscene material, when the offender knows that such material is to be used for commercial exploitation or will be publicly disseminated or displayed, or when he is reckless in that regard;

"(2) Exhibit or advertise for sale or dissemination, or sell or publicly disseminate or display any obscene material;

"[(2) Promote or advertise for sale, delivery, or dissemination; sell, deliver, publicly disseminate, publicly display, exhibit, present, rent, or provide; or offer or agree to sell, deliver, publicly disseminate, publicly display, exhibit, present, rent, or provide, any obscene material;]

"(3) Create, direct, or produce an obscene performance, when the offender knows that it is to be used for commercial exploitation or will be publicly presented, or when he is reckless in that regard;

"(4) Advertise [or promote] an obscene performance for presentation, or present or participate in presenting an obscene performance[,] when such performance is presented publicly, or when admission is charged;

"(5) [Buy, procure,] Possess[,] or control any obscene material with the purpose to violate division (A)(2) or (4) of this section.

"(B) It is an affirmative defense to a charge under this section, that the material or performance involved was disseminated or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor,

judge, or other person having a proper interest in such material or performance.

"(C) Whoever violates this section is guilty of pandering obscenity, a misdemeanor of the first degree. Persons convicted under this section may not be prosecuted for a second violation under this section. Also persons previously convicted of a violation of Section 133.011 may not be prosecuted under this section.

"[(C) Whoever violates this section is guilty of pandering obscenity, a misdemeanor of the first degree. If the offender previously has been convicted of a violation of this section or of section 2907.31 of the Revised Code, then pandering obscenity is a felony of the fourth degree.]"

U.C.C. Section 133.013, presumptions; notice; defense, parallels R.C. 2907.35. It provides:

"(A) An owner or manager, or his agent or employee, of a bookstore, newsstand, theater, or other commercial establishment engaged in selling materials or exhibiting performances, who, in the course of business:

"(1) Possesses five or more identical or substantially similar obscene articles, having knowledge of their character, is presumed to possess them in violation of division (A)(5) of section 133.012 [2907.32 of the Revised Code];

"(2) Does any of the acts prohibited by sections 133.011 or 133.012 [2907.31 or 2907.32 of the Revised Code,] is presumed to have knowledge of the character of the material or performance involved, if he has actual notice of the nature of such material or performance, whether or not he has precise knowledge of its content[s];

"(B) Without limitation on the manner in which such notice may be given, actual notice of the character of material or [a] performance may be given in writing by the chief legal office of the City [chief legal officer of the jurisdiction in which the person to whom the notice

is directed does business]. Such notice, regardless of the manner in which it is given, shall identify the sender, identify the material of [or] performance involved, state whether it is obscene or harmful to juveniles, and bear the date of such notice.

"[(C) Sections 2907.31 and 2907.32 of the Revised Code do not apply to a motion picture operator or projectionist acting within the scope of his employment as an employee of the owner or manager of a theater or other place for the showing of motion pictures to the general public, and having no managerial responsibility or financial interest in his place of employment, other than wages.]"

U.C.C. Section 133.014, declaratory judgment, parallels R.C. 2907.36. It provides:

"(A) Without limitation on the persons otherwise entitled to bring an action for declaratory judgment pursuant to sections 2721.01 to 2721.15 of the Ohio Revised Code, involving the same issue, the following persons have standing to bring such an action to determine whether particular materials or performances are obscene or harmful to juveniles:

"(1) The chief legal officer of the City if [jurisdiction in which] there is reasonable cause to believe that sections 133.011 or 133.012 [section 2907.31 or 2907.32 of the Revised Code] are being violated or are about to be violated [is being or is about to be violated;].

"(2) Any person, who pursuant to division (B) of section 133.013 [2907.35 of the Revised Code], has received notice in writing from a chief legal officer of the City stating that particular materials or performances are obscene or harmful to juveniles.

"(B) Any party to an action for a declaratory judgment pursuant to division (A) of this section is entitled, upon his request, to trial on the merits within five days

after joinder of the issues, and the court shall render judgment within five days after trial is concluded.

"(C) An action for a declaratory judgment pursuant to division (A) of this section shall not be brought during the pendency of any civil action or criminal prosecution, when the character of the particular materials or performances involved is at issue in the pending case, and either of the following apply:

"(1) Either of the parties to the action for a declaratory judgment is a party to the pending case;

"(2) A judgment in the pending case will necessarily constitute res judicata as to the character of the materials or performances involved.

"(D) A civil action or criminal prosecution in which the character of particular materials or performances is at issue, brought during the pendency of the action for a declaratory judgment involving the same issue[,] shall be stayed during the pendency of the action for a declaratory judgment.

"(E) The fact that a violation of sections [section] 133.011 or 133.012 [2907.31 or 2907.32 of the Revised Code] occurs prior to a judicial determination of the character of the material or performance involved in the violation, does not relieve the offender of criminal liability for the violation, even though prosecution may be stayed pending the judicial determination."

APPENDIX B

THE SUPREME COURT OF OHIO

1989 TERM
To wit: May 24, 1989

Case No. 88-30

CITY OF URBANA, *ex rel.*
JOHN C. NEWLIN, DIRECTOR OF LAW,
Appellee,

v.

CHARLES DOWNING *et al.*,
Appellants.

MANDATE

To the Honorable Municipal Court

Within and for the County of Champaign, Ohio.

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals is affirmed consistent with the opinion rendered herein.

COSTS:

Motion Fee, $20.00, paid by Shulman & Hall

Printing of Record, $865.82, paid by Shulman & Hall.

(Court of Appeals No. 87CA03)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

APPENDIX C

IN THE COURT OF APPEALS
OF CHAMPAIGN COUNTY, OHIO

Case No. 87 CA 03

CITY OF URBANA, OHIO, *ex rel.*
JOHN C. NEWLIN, DIRECTOR OF LAW,
Plaintiff-Appellee

VS.

CHARLES DOWNING, *et al.*,
Defendants-Appellants

OPINION

Rendered on the 16th day of November, 1987

JOSEPH A. PALMER, 180 North Walnut Street, P. O. Box 38213, Urbana, Ohio 43078, Attorney for Plaintiff-Appellee.

MICHAEL W. HEMM, 311 North Wayne Street, P. O. Box 506, Piqua, Ohio 45356, Trial Attorney for Defendant-Appellants.

THOMAS G. KRAMER, Shulman & Hall, 1000 Courthouse Plaza, S.W., Dayton, Ohio 45402, Of Counsel for Defendants-Appellants.

WOLFF, J.

John C. Newlin, the Law Director of the City of Urbana, brought an action in the Urbana Municipal Court,

pursuant to Section 133.014 of the Code of Ordinances of the City of Urbana (U.C.O.), seeking a determination that five "male sophisticate" magazines sold by defendants-appellants were obscene. The defendants eventually waived a trial by jury and the matter was tried to the municipal judge, who determined that the five magazines were obscene. Defendants appeal, advancing ten assignments of error.

1. THE COURT ERRED IN OVERRULING DEFENDANTS/APPELLANTS' SEVERAL MOTIONS TO DISMISS THE CASE FOR LACK OF SUBJECT MATTER JURISDICTION.

The threshold issue, raised by this assignment, is whether the Urbana Municipal Court had subject matter jurisdiction to grant a declaratory judgment that the five magazines were obscene. Defendants correctly point out that municipal courts are courts of limited jurisdiction, having only that jurisdiction specifically granted by the legislature, and that R.C. 2721.02, providing that "courts of record" may grant declaratory judgments, does not permit a court of limited jurisdiction to grant a declaratory judgment in a matter which is beyond the specific legislative grant of subject matter jurisdiction. *See State ex rel. Foreman v. Bellefountaine Municipal Court* (1967), 12 Ohio St. 2d 26.

We reject the City's contention that U.C.O. 133.014 confers subject matter jurisdiction because only the legislature can do so.

We do, however, conclude that subject matter jurisdiction in the Urbana Municipal Court can be found in R.C. 1901.20(A), which in part provides "the municipal court has jurisdiction of the violation of any ordinance of any municipal corporation within its territory . . ."

Ordinance No. 3668, passed February 12, 1985, represents an effort by the Urbana City Council to enact

comprehensive legislation regulating obscenity and material harmful to juveniles. Ordinance 3668 enacted, *inter alia*, U.C.O. 133.014, together with U.C.O. 133.011—disseminating material harmful to juveniles, and U.C.O. 133.012—pandering obscenity. Both of these offenses are first degree misdemeanors, which are within the jurisdiction of the Urbana Municipal Court under R.C. 1901.20(A).

Hence, we take the view that a declaratory judgment action under U.C.O. 133.014 is in furtherance of the misdemeanor jurisdiction of the Urbana Municipal Court. The *nature* of the contents of a particular "male sophisticate" magazine varies little from issue to issue. Hence, an adjudication of obscenity as to a certain magazine would probably trigger a prosecution under U.C.O. 133.012 if sales of subsequent issues persisted, and an adjudication that a certain magazine was not obscene would discourage prosecution under U.C.O. 133.012. The litigation of the obscenity issue under the declaratory judgment section of the ordinance, U.C.O. 133.014, involves no more and no less than the adjudication of the obscenity element of a misdemeanor prosecution for pandering obscenity under U.C.O. 133.012. It would be incongruous if a municipal court had the authority to litigate the obscenity issue in a criminal prosecution, but not in a declaratory judgment action.

Furthermore, U.C.O. 133.012 requires the prosecution to establish a defendant's knowledge of the character of the material. Subsection (A). An adjudication of obscenity as to a particular issue of a particular magazine would be at least relevant to the knowledge element of a prosecution based on the sale of later issues of the same magazine.

The first assignment is overruled.

2. THE COURT ERRED IN OVERRULING DEFENDANTS/APPELLANTS' MOTION TO DISMISS UNDER CIV. R. 12(B)(6).

In support of its 12(B)(6) motion to dismiss, the defendants argued at the trial level that to pass constitutional muster, Section U.C.O. 133.01(A) must be read *in pari materia* with the three-prong test of *Miller v. California* (1973), 413 U.S. 25. U.C.O. 133.01(A) describes "sexual conduct" as vaginal intercourse, anal intercourse, fellatio, and cunnilingus.

Miller, supra, provides in pertinent part as follows:

> As a result, we now confine the permissible scope of such regulation to works which depict or describe *sexual conduct.* That conduct must be specifically defined by the applicable state law, *as written or authoritatively construed.* A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.
>
> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, . . . (b) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value . . . We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, *supra*:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representation or descriptions of masturbation, excretory functions, *and lewd exhibition of the genitals.* (Emphasis ours.)

The appellants argued at the trial level that the magazines did not depict sexual conduct as defined at Section 133.01(A) or under the *Miller* examples of proscribable material. While it is true that, for the most part, the magazines do not depict "sexual conduct" as defined by U.C.O. 133.01(A), examination of the complaint reveals that Newlin did not contend that the magazines depicted "sexual conduct" but that they were obscene under U.C.O. 133.01(E). U.C.O. 133.01(E) provides in pertinent part:

. . . any material . . . is "obscene" if any of the following apply:

(5) It contains a series of displays . . . of . . . *nudity*, . . . the cumulative effect of which is a dominant tendency to appeal to prurient . . . interest . . . when the appeal to such an interest is primarily of its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral or artistic purpose.

The appellants argued to the trial court that part (b) of the three-prong *Miller* test, *supra*, was pertinent to the 12(B)(6) motion. It is clear that the phrase "sexual conduct", as used in *Miller*, is broader than the definition of sexual conduct contained in U.C.O. 113.01(A). The trial judge could have authoritatively construed U.C.O. 113.01(E) by engrafting the "lewd exhibition of the genitals" language of *Miller* onto the above-cited "nudity" language from U.C.O. 113.01(E), and found the magazines were devoted to material that was properly proscribed under *Miller*.

The defendants argued for the first time after trial that the trial court should not read *Miller* into the Urbana Ordinance because it was enacted 12 years after *Miller* was decided. For purposes of this assignment, defendants cannot have it both ways. If they argued to the trial judge, in support of the 12(B)(6) motion, that he should read *Miller* into the Urbana Ordinance, they can hardly argue on appeal that the trial court should not have read *Miller* into the Urbana Ordinance in determining their 12(B)(6) motion to dismiss.

We have examined the five magazines attached to the complaint, and conclude that the complaint was sufficient to survive a 12(B)(6) motion to dismiss. The magazines were replete with material proscribed by U.C.O. 113.01(E), as authoritatively construed by reading *Miller in pari materia* with U.C.O. 113.01(E).

The second assignment of error is overruled.

3. THE COURT ERRED IN OVERRULING DEFENDANTS/APPELLANTS' SEVERAL MOTIONS TO DISMISS THE CASE FOR LACK OF MONETARY JURISDICTION OVER THE CASE.

Defendants argue that because they stood to lose more than $10,000 in revenue if their trade in "male sophisticate" magazines was curtailed in Champaign County, the municipal court lacked monetary jurisdiction under R.C. 1901.17, which provides "A municipal court shall have original jurisdiction only in those cases where the amount claimed by any party, or the appraised value of the personal property sought to be recovered, does not exceed $10,000".

Newlin's action sought nothing more than a declaration that five magazines were obscene. The City of Urbana was not claiming any amount, much less $10,000. This argument is belied by the statute language relied

upon. While a ruling adverse to defendants might ultimately result in a loss of revenue in excess of $10,000, such a possibility is of no consequence in determining whether the court had subject matter jurisdiction.

The third assignment of error is overruled.

4. THE COURT ERRED IN ADMITTING INCOMPETENT AND INADMISSIBLE EVIDENCE TO WHICH OBJECTION WAS MADE BY DEFENDANTS/APPELLANTS.

The first prong of the three-prong *Miller* test requires evidence tending to establish that " 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . .".

The ultimate determination must be made by the trier of fact—in this case, the trial judge because the defendants waived trial by a jury.

Five witnesses expressed opinions which collectively tended to establish that the average citizen of Champaign County, applying the standards of that community, would find that the five magazines appealed to the prurient interest.

This testimony was objected to for various reasons, but the reason surviving on appeal is that it runs afoul of Evid.R. 701, which provides:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) *rationally based on the perception of the witness and* (2) *helpful to* a clear understanding of his testimony or *the determination of a fact in issue.*

The objection to this testimony is that the witnesses were expressing *pure* opinions.

Undeniably, none of the five witnesses were strident civil libertarians. Each of them also expressed strong personal biases about obscenity. However, the testimony, taken as a whole, is more than merely the pure opinions of the five witnesses, detached from any factual underpinning.

All of the witnesses were long-time residents of Champaign County. Each of the witnesses had wide professional, business, or civic involvement, or a combination of these involvements, that brought the witness into contact with many people from the community. Naturally, some witnesses had narrower spectrums of acquaintances than did others.

All of these witnesses testified that the impression they got from their contacts in the community was that the community in general was opposed to the sale of obscene materials. All of these witnesses personally inspected the five magazines and either expressly or implicitly opined that they appealed to the prurient interest. Some of the witnesses further testified that their opinions were those of the average person in the community.

It can be fairly said that these witnesses' opinions were rationally based on their actual perceptions. They testified that through their contacts with others in the community they were conversant with community mores as to obscenity. Each of them examined the five magazines personally. Most thought they represented the average citizen. While their testimony might have been colored by their personal views about the evils of obscenity, that coloration went to the weight rather than the competence of the testimony. So, too, the fact that no witness was acquainted with the views of everyone in the community. The trial judge appears to have understood his responsibility to take such factors into account in determining the weight to be given to the testimony.

The ultimate determination for the finder of fact was whether the average person applying contemporary com-

munity standards would find the work taken as a whole appeals to the prurient interest. This opinion evidence was certainly helpful to the trial judge's determination of this factual issue.

The opinion evidence was properly admitted under Evid. R. 701.

The fourth assignment is overruled.

5. THE COURT ERRED IN RULING THAT JOHN C. NEWLIN HAD STANDING TO INITIATE THIS SUIT.

U.C.O. 113.014(A)(1) provides that a declaratory judgment action may be brought by the "chief legal officer of the City if there is *reasonable cause* to believe that sections 133.011 or 133.012 are being violated or about to be violated." (Emphasis ours.) The argument here is that City Law Director Newlin had no "reasonable cause" to believe that the five magazines were obscene, and, hence, that U.C.O. 133.012—pandering obscenity—was being violated.

The gist of the argument was that Newlin was not in a position, prior to the initiation of the suit, to know whether the average person applying contemporary community standards would find the magazines taken as a whole appeal to the prurient interest, and whether the works depict or describe in a patently offensive way sexual conduct specifically defined by the applicable state law. See the first two prongs of the three-prong *Miller* test, *supra*.

Newlin testified that he had lived in Champaign County since December 1975, i.e., approximately 10 years before he initiated the suit. He admitted that his own knowledge of obscenity law was superficial. He conceded that the ordinance did not specifically incorporate the *Miller* test or the two *Miller* examples of sexual conduct. He indicated that he had done no research prior to initi-

ating suit as to prevailing community standards concerning either magazines or videos. He conceded that a valid poll of the reading preferences of the adult community of Champaign County might be of some relevance in determining community standards. He admitted that he had made no effort to see how many Champaign County cars could be found at the Blue Moon drive-in theater in Clark County which shows X-rated movies.

He testified that he bought the five magazines from defendants' store, conferred with City Prosecutor Joseph A. Palmer, formed his own opinion that the magazines were obscene, and commenced prosecution of the declaratory judgment suit. He also testified that he had a pretty good feeling for community standards. Finally, he stated he was the law director of the City of Urbana at the time the ordinance was passed. Despite Newlin's lack of market research and expertise in obscenity law, a perusal of the five magazines in question was, we conclude, sufficient to give the chief legal officer of the City of Urbana "reasonable cause" to believe that Section 133.012—pandering obscenity—was being violated. "Reasonable cause to believe" may be premised on information considerably short of evidence sufficient to establish a case under the three-prong *Miller* test. This assignment of error is overruled.

6. THE JUDGMENT AND FINDINGS OF THE COURT ARE NOT SUSTAINED BY SUFFICIENT EVIDENCE, AND ARE CONTRARY TO LAW.

In this assignment of error, defendants argue that the City of Urbana's evidence failed to establish any of the three prongs of the *Miller* test, which are stated as follows:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient

> interest, . . . (b) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

For the reasons we have expressed in connection with the appellants' fourth assignment of error, we conclude that there was competent, credible evidence to support a determination that the average Champaign County resident, applying contemporary community standards, would find that the magazines, taken as a whole, appeal to the prurient interest.

To be sure, the defendants countered the City's evidence with evidence of their own, which tended to establish the contrary. However, the weight to be accorded to the parties' evidence is for the fact finder, not for this court. So long as there was competent, credible evidence going to all the essential elements of the first prong of the *Miller* test, this court will not interfere. Having considered the testimony of the City's witnesses and the five magazines in question, we are satisfied that there was competent credible evidence supporting a determination that the first prong of the *Miller* test had been satisfied.

The defendants argue that the second prong of the *Miller* test is not established in this case because the magazines are free of portrayals of "sexual conduct" as defined at U.C.O. 133.01(A), i.e., vaginal intercourse, anal intercourse, fallatio (*sic*) and cunnilingus.

While the magazines are not completely free of depictions of "sexual conduct" as defined at U.C.O. 133.01(A), we agree with the defendants that the magazines are largely free of such depictions.

However, the scope of proscribable "sexual conduct" in *Miller* goes beyond the depiction of sexual conduct as defined by U.C.O. 133.01(A) and extends to "lewd exhibi-

tion of the genitals." U.C.O. 133.01(E)(5), as noted *supra*, provides as follows:

> When considered as a whole, and judged with reference to ordinary adults . . . any material . . . is "obscene" if any of the following apply:
>
> . . . .
>
> (5) It contains a series of displays . . . of . . . nudity, the cumulative effect of which is a dominant tendency to appeal to prurient . . . interest, when the appeal to such an interest is primarily of its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral or artistic purpose.

Reading "nudity" to mean "lewd exhibition of the genitals", the fact finder could have reasonably found, from an examination of the magazines, with or without additional evidence, that they depicted in a patently offensive way sexual conduct specifically defined by the applicable state law.

Likewise, the fact finder could have reasonably determined from a perusal of the magazines, with or without additional testimony, that, taken as a whole, they lacked serious literary, artistic, political or scientific value.

The sixth assignment of error is overruled.

7. THE COURT ERRED IN OVERRULING DEFENDANTS/APPELLANTS' SEVERAL MOTIONS TO DISMISS ON THE GROUND OF MOOTNESS.

In their brief, defendants argue that because the magazines are periodicals and no longer offered for sale—being December 1985 or January 1986 issues—the controversy was moot once these magazines were no longer current. This argument seems to be undercut by defendants' statement during oral argument that the judgment

appealed from would be germane to the issue of knowledge in any future prosecution. Indeed, U.C.O. 133.012 (A) (2) of the Urbana Ordinance states in part:

> No person, with knowledge of the character of the material . . . shall . . . sell . . . any obscene material; . . .

Furthermore, as observed, *supra*, the *nature* of a magazine's contents does not differ markedly from issue to issue. Hence, a finding of obscenity as to these particular magazines would probably encourage a prosecution under U.C.O. 133.012 for the sale of future issues of these magazines, whereas an adjudication of non-obscenity would correspondingly discourage a prosecution for sale of future issues of these magazines. Hence, we reject the argument that the controversy was moot once the particular magazines were no longer current enough for sale. Accordingly, we overrule this assignment of error.

8. THE COURT ABUSED ITS DISCRETION IN ENTERING A DECLARATORY JUDGMENT NOTWITHSTANDING THE PROVISIONS OF O.R.C. SECTION 2721.07.

R.C. 2721.07 provides: "Courts of record may refuse to render or enter a declaratory judgment or decree when such judgment or decree would not terminate the uncertainty or controversy giving rise to the proceeding".

The defendants' two arguments in support of this assignment of error are, first, that the declaratory judgment resolved nothing because the particular magazines in question will not be offered for sale in the future, and, second, that the declaratory judgment is of no value because it was not based on evidence "beyond a reasonable doubt".

For the reasons stated in connection with the seventh assignment of error, we reject the first argument.

We also reject the second argument. The defendants persuaded the trial court to require the City to establish its case beyond a reasonable doubt. Prior to trial, the court indicated that it would hold the City of Urbana to a standard of proof sufficient "beyond a reasonable doubt". Furthermore, in his findings of fact, conclusions of law, memorandum of decision and journal entry of judgment, filed March 20, 1987, the trial judge stated in no fewer than four places that he applied the "beyond a reasonable doubt" standard of proof. *See* pp. 4, 7, 10 and 14. The eighth assignment of error is overruled.

9. THE COURT ERRED IN APPLYING SECTIONS 133.01 THROUGH 133.015 OF THE CODE OF ORDINANCES OF THE CITY OF URBANA, INASMUCH AS THESE PROVISIONS ARE UNCONSTITUTIONALLY OVERBROAD AND VOID FOR VAGUENESS.

10. THE COURT ERRED IN UNCONSTITUTIONALLY CONSTRUING AND APPLYING SECTIONS 133.01 THROUGH 133.015 OF THE CODE OF ORDINANCES OF THE CITY OF URBANA.

After arguing to the trial court in connection with its pretrial motion to dismiss that the trial court must read *Miller v. California* into the Urbana Ordinance, the defendants argued post-trial and now on appeal that it was impermissible for the trial court to read *Miller* into the definition of obscenity contained in U.C.O. 133.05(E).

The defendants recognize that the Urbana Ordinance definition of obscenity is idential to the pre-*Miller* definition of obscenity found in R.C. 2907.01(F).

The first syllabus of *State v. Burgun* (1978) 56 Ohio St. 2d 354 provides as follows:

> R.C. 2907.01(F), which sets forth the definition of "obscenity," is neither unconstitutionally overbroad

> nor void for vagueness when it is authoritatively construed to incorporate the guidelines prescribed in *Miller v. California*, 413 U.S. 15.

The defendants argue that although it was appropriate to read *Miller* into a pre-*Miller* state statute to save it from constitutional condemnation, it is inappropriate to do likewise with a post-*Miller* statute or ordinance.

The defendants have furnished us with no authority for their argument, and although we agree that neither trial nor appellate courts should be in the business of rewriting ordinances, we find no reason of constitutional dimension to preclude reading *Miller* into a post-*Miller* ordinance identical to R.C. 2907.01(F) where the Supreme Court of this State has read *Miller* into pre-*Miller* R.C. 2907.01(F). The trial court's reading of *Miller* into U.C.O. 133.05(E) did not expand, but instead, restricted the scope of proscribable material under the ordinance. The ninth and tenth assignments of error are overruled.

The judgment of the Urbana Municipal Court will be affirmed.

BROGAN, J., and FAIN, J., concur.

Copies mailed to:

Joseph A. Palmer
Michael W. Hemm
Thomas G. Kramer
Hon. Joseph P. Valore

APPENDIX D

Original Mailed to Clerk of Courts December 7, 1987

IN THE COURT OF APPEALS
OF CHAMPAIGN COUNTY, OHIO

Case No. 87 CA 03

CITY OF URBANA, OHIO, *ex rel.*
JOHN C. NEWLIN, DIRECTOR OF LAW,
Plaintiff-Appellee

vs.

CHARLES DOWNING, *et al.*,
Defendants-Appellants

DECISION AND ENTRY

Rendered on the 8th day of December, 1987

JOSEPH A. PALMER, 180 North Walnut Street, P.O. Box 38213, Urbana, Ohio 43078, Attorney for Plaintiff-Appellee.

MICHAEL W. HEMM, 311 North Wayne Street, P.O. Box 506, Piqua, Ohio 45356, Trial Attorney for Defendants-Appellants.

THOMAS G. KRAMER, Shulman & Hall, 1000 Courthouse Plaza, S.W., Dayton, Ohio 45402, Of Counsel for Defendants-Appellants.

PER CURIAM:

Appellants have moved for reconsideration of our opinion of November 16, 1987. Their main contention is that this court "abdicate(d)" its responsibility for conducting an independent review of the facts in favor of a limited search for 'some competent evidence' to support the lower court's ruling".

This contention is unfounded although the language of our opinion has apparently created appellant's misapprehension about the nature of the review we conducted prior to rendering our opinion November 16.

As appellants point out, the case for independent review was forcefully stated by Justice Brennan in *Jacobellis v. Ohio* (1964), 378 U.S. 184. In *Jacobellis*, Justice Brennan also stated that appellate determinations of obscenity were to be made with reference to a "national standard":

> We thus reaffirm the position taken in Roth to the effect that the constitutional status of an allegedly obscene work must be determined on the basis of a national standard. It is, after all, a national Constitution we are expounding. (Footnote omitted.)

(p. 195.)

While the responsibility for independent review survives *Miller v. California* (1973), 413 U.S. 15—*see Miller* at 25—the "national standard" concept has not. *Miller* at 30-35. Hence, the independent review to which appellants are entitled, as it relates to the first prong of the *Miller* test,

> (W)hether "the average person, applying contemporary community standards" would find that

> the work, taken as a whole, appeals to the prurient interest, . . .

must necessarily be deferential to the factfinder, particularly as to conflicting evidence.

The judges participating in this case are not residents of the Champaign County community. Nor is it for us to assess the credibility of the testimony. The Supreme Court has stated in *Hamling v. United States* (1974), 418 U.S. 87 at 99-101, that expert testimony is not necessary to enable a jury to judge the obscenity of material which has been placed into evidence, and that the jury is not bound to accept the opinion of any expert in weighing the evidence of obscenity.

We perceive that our obligation of independent review is, as to the first prong of the *Miller* test, discharged by a determination of whether "there is substantial evidence, taking the view most favorable to the Government (here Urbana), to support" the trial court's finding that the first prong had been satisfied. *Hamling* at 124.

Much of appellants' case consisted of evidence tending to show there was a significant demand for "male sophisticate" magazines and X-rated videos in Champaign County. While relevant to the inquiry under the first prong of *Miller*, this evidence was by no means dispositive.

We have reviewed the testimony and the documentary evidence, together with the five magazines in question, and have satisfied ourselves that there was substantial evidence to support the trial judge's determination that the first prong of *Miller* had been satisfied.

Post-*Miller*, the independent review spoken of by Justice Brennan in *Jacobellis* is concentrated on the second and third prongs of the *Miller* test:

> (W)hether the work depicts or describes in a patently offensive way, sexual conduct specifically de-

fined by the applicable state law; and whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

The majority and concurring opinions in *Jenkins v. Georgia* (1974), 418 U.S. 153 are instructive.

Justice Rehnquist, writing for the majority, states at 159-161:

> Appellee contends essentially that under *Miller* the obscenity *vel non* of the film "Carnal Knowledge" was a question for the jury, and that the jury having resolved the question against appellant, and there being some evidence to support its findings, the judgment of conviction should be affirmed. We turn to the language of *Miller* to evaluate appellee's contention.
>
> *Miller* states that the questions of what appeals to the "prurient interest" and what is "patently offensive" under the obscenity test which it formulates are "essentially questions of fact." 413 U.S., at 30, 93 S.Ct., at 2618. "When triers of fact are asked to decide whether 'the average person, applying contemporary community standards' would consider certain materials 'prurient' it would be unrealistic to require that the answer be based on some abstract formulation . . . . To require a State to structure obscenity proceedings around evidence of a *national* 'community standard' would be an exercise in futility." *Ibid.* We held in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973), decided on the same day, that expert testimony as to obscenity is not necessary when the films at issue are themselves placed in evidence. *Id.*, at 56, 93 S.Ct. at 2634.
>
> But all of this does not lead us to agree with the Supreme Court of Georgia's apparent conclusion

that the jury's verdict against appellant virtually precluded all further appellate review of appellant's assertion that his exhibition of the film was protected by the First and Fourteenth Amendments. Even though questions of appeal to the "prurient interest" or of patent offensiveness are "essentially questions of fact," it would be a serious misreading of *Miller* to conclude that juries have unbridled discretion in determining what is "patently offensive." Not only did we there say that "the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary," 413 U.S., at 25, 93 S.Ct., at 2615, but we made it plain that under that holding "no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct . . . ." *Id.*, at 27, 93 S.Ct., at 2616.

We also took pains in *Miller* to "give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced," that is, the requirement of patent offensiveness. *Id.*, at 25, 93 S.Ct., at 2615. These examples include "representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated," and "representations or descriptions of masturbation, excretory functions, and *lewd exhibition of the genitals.*" *Ibid.* While this did not purport to be an exhaustive catalog of what juries might find patently offensive, *it was certainly intended to fix substantive constitutional limitations, deriving from the First Amendment, on the type of material subject to such a determination.* It would be wholly at odds with this aspect of *Miller* to uphold an obscenity conviction based upon a defend-

> ant's depiction of a woman with a bare midriff, even though a properly charged jury unanimously agreed on a verdict of guilty.

(Emphasis in fourth paragraph ours.)

Justice Brennan, concurring, amplifies upon the language of Justice Rehnquist:

> After the Court's decision today, there can be no doubt that *Miller* requires appellate courts—including this Court—to review independently the constitutional fact of obscenity. Moreover, the Court's task is not limited to reviewing a jury finding under part (c) of the *Miller* test that "the work, taken as a whole, lack[ed] serious literary, artistic, political, or scientific value." 413 U.S., at 24, 93 S.Ct., at 2615. *Miller*, also requires independent review of a jury's determination under part (b) of the *Miller* test that "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law."
>
> . . .
>
> In order to make the review mandated by *Miller*, the Court was required to screen the film, "Carnal Knowledge" and make an independent determination of obscenity *vel non* . . . .

(*Id.* at 163-4.)

In our November 16, 1987, opinion, we held that the trial court properly read the "lewd exhibition of the genitals" example in *Miller* into U.C.O. 133.01(E)(5). *See* pp. 16-17. We examined the five magazines in question and found they contained lewd exhibitions of the genitals, and that they depict in a patently offensive way sexual conduct specificlly (*sic*) defined by the applicable state law, here, the Urbana ordinance. We were also

satisfied from our examination that the magazines lack serious literary, artistic, political or scientific value.

Appellants point out that we stated their argument against reading *Miller* into the Urbana ordinance was first made after trial when it was, in fact, made during trial. Although the argument first appeared in writing after trial, appellants are correct that the argument was made orally, albeit somewhat vaguely, during trial. However, whether the argument was first made during or after trial is of no consequence to the appeal. The discussion of when the argument was first made was important only to the disposition of the second assignment of error, which claimed that the trial court erred in overruling appellants' Civ. R. 12(B)(6) motion to dismiss. Whether the argument was first raised during or after trial would not affect our disposition of an assignment of error involving disposition of a pre-trial motion.

This court in no way precluded appellants from arguing that the trial court erred in reading *Miller* into the Urbana ordinance, except as to the second assignment of error. *See* page 6 of our opinion where we stated:

> *For purposes of this assignment*, defendants cannot have it both ways. If they argued to the trial judge, in support of the 12(B)(6) motion, that he should read *Miller* into the Urbana Ordinance, they can hardly argue on appeal that the trial court should not have read *Miller* into the Urbana Ordinance *in determining their 12(B)(6) motion to dismiss.*

(Emphasis ours.)

Our disposition of the ninth and tenth assignments of error, which embraced this argument, was on the merits and unaffected by when the argument was first raised. We stand by our disposition of the ninth and tenth assignments.

The motion for reconsideration is OVERRULED. Our judgment entry will be filed contemporaneously with this decision and entry.

/s/ James A. Brogan
JAMES A. BROGAN
Judge

/s/ William H. Wolff, Jr.
WILLIAM H. WOLFF, JR.
Judge

/s/ Mike Fain
MIKE FAIN
Judge

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Thomas G. Kramer

APPENDIX E

Original Mailed to Clerk of Courts December 7, 1987

IN THE COURT OF APPEALS
OF CHAMPAIGN COUNTY, OHIO

Case No. 87 CA 03

CITY OF URBANA, OHIO, *ex rel.*,
JOHN C. NEWLIN, DIRECTOR OF LAW,
Plaintiff-Appellee

vs.

CHARLES DOWNING, *et al.*,
Defendants-Appellants

FINAL ENTRY

Pursuant to the opinion of this court rendered on the 16th day of November, 1987, the judgment of the Urbana Municipal Court is affirmed.

/s/ James A Brogan
JAMES A. BROGAN
Judge

/s/ William H. Wolff, Jr.
WILLIAM H. WOLFF, JR.,
Judge

/s/ Mike Fain
MIKE FAIN
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APPENDIX F

IN THE CHAMPAIGN COUNTY MUNICIPAL COURT, URBANA, OHIO

Case No. 85 CVH 343

CITY OF URBANA, OHIO, *ex rel.*,
JOHN C. NEWLIN, DIRECTOR OF LAW,
Plaintiff

-vs-

CHARLES DOWNING, *et al.*,
Defendants.

FINDINGS OF FACT
CONCLUSIONS OF LAW
MEMORANDUM OF DECISION
JOURNAL ENTRY OF JUDGMENT

[Filed March 20, 1987]

PRELIMINARY STATEMENT

Trial in this matter was held to the Court on the 9th, 10th, and 11th days of December, 1986. After the presentation of testimony and evidence, the Court took the case under advisement. A briefing schedule was arranged and briefs have been filed.

The Court compliments counsel for their diligent preparation, effective presentations, and professional conduct throughout the case.

After a review of all matters in the case, the Court finds for the Plaintiff in this declaratory judgment action. The specific findings, conclusions, and reasons are set forth.

FINDINGS OF FACT

1. The Court has statutory authority to hear this case.

2. The Court has subject matter jurisdiction of this case.

3. The Court has monetary jurisdiction for this case.

4. Plaintiff is the Law Director of Urbana.

5. Defendants operated a store in Urbana.

6. Defendants' store sells various items including publications.

7. Defendants sold the magazines Big Boobs, Juggs, Nugget, Oui, and Velvet for a period of time before the date in question.

8. On November 25, 1985, John Newlin bought five magazines, to-wit: Big Boobs (March 1986 issue), Juggs (January 1986 issue), Nugget (January 1986 issue), Oui (December 1985 issue), and Velvet (January 1986 issue). (Exhibits 1, 2, 3, 4, 5 are the magazines involved herein).

9. When this case was filed, counsel agreed that further sale of these five titled magazines would be withheld pending the outcome of Court proceedings.

10. Each of the five magazine issues in question, taken as a whole, appeals to the prurient interest of the average person applying contemporary community standards.

11. Each of the five magazine issues in question depicts or describes in a patently offensive way, sexual conduct as defined by applicable state law.

12. Each of the five magazine issues in question, taken as a whole, lacks serious literary, artistic, political or social value.

13. Each of the five magazine issues in question, taken as a whole, is obscene.

14. The contemporary community standard involved is for Champaign County, not just Urbana.

15. Prurient interest means "morbid or shameful interest in sex, nudity or excretion as distinguished from candid, normal interest in sex."

16. The United States Supreme Court obscenity case of *Miller vs. California*, 413 US 15 (1973) refers to sexual conduct as defined by state law.

17. Ohio Revised Code Section 2907.01 provides definitions for sex offenses and defines sexual conduct as vaginal intercourse between a male and female and anal intercourse, fellatio and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

18. The definition of sexual conduct for obscenity purposes is not limited to the definition of sexual conduct for sex crimes purposes of Chapter 2907 Revised Code.

19. "Sexual conduct" includes the following:

a. Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

b. Patently offensive representations of masturbation, excretory functions and lewd exhibitions of human genitals.

20. "Sexual activity" means sexual conduct or sexual contact, or both.

21. "Sexual contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

22. "Sexual excitement" means the condition of the human male or female genitals when in a state of sexual stimulation or arousal.

23. "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

24. "Patently offensive" means substantially beyond customary limits of candor in describing or representing sexual matters. It means deviation from society's standards of decency because it affronts contemporary community standards relating to the description or representation of sexual matters.

CONCLUSIONS OF LAW

1. The Court adopts all findings of fact as conclusions of law as if fully rewritten.

2. The burden of proof of the Plaintiff in this case is beyond a reasonable doubt.

3. The issues in this case are not moot.

4. In determining the question of obscenity, the Court applied the Urbana Municipal Ordinance language, which is set forth as follows:

..*Obscene Material.* When considered as a whole, and judged with reference to ordinary adults or, if it is designed for sexual deviates or other specially susceptible group judged with reference to that group, any material is "obscene" if any of the following apply:

1. Its dominant tendency is prurient interest.
2. Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way that tends to represent human beings as mere objects of sexual appetite.

3. Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality.

4. Its dominant tendency is to appeal to scatological interest which means displaying or depicting human bodily functions or (*sic*) elimination in a way that inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral or artistic purpose.

5. It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral or artistic purpose.

5. In determining the question of obscenity, the Court applied the three prong standard of *Miller vs. California*, which standard is set forth as follows:

a. Whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest.

b. Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law.

c. Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

MEMORANDUM OF DECISION

As the Court noted at the outset, this is a declaratory judgment action filed under the Urbana Municipal Ordinance.

Section 133.014(A) of the Urbana City Ordinance states:

> "Without limitation on the persons otherwise entitled to bring an action for declaratory judgment pursuant to Sections 2721.01 to 2721.15 of the Ohio Revised Code, involving the same issue, the following persons have standing to bring such an action to determine whether particular materials or performances are obscene . . ."

The Urbana Municipal Ordinance is patterned after Ohio Revised Code Sections 2907.31 et seq. The Urbana Municipal Ordinance provides that declaratory judgment action be brought in the Champaign County Municipal Court. There is no law (statutory, case or rule) that prohibits this type of action from being brought in the Champaign County Municipal Court. In fact, Section 2721.02 of the Ohio Revised Code states "Courts of record may declare rights . . ." It is not disputed that the Champaign County Municipal Court is a Court of Record. The Court believes that the Champaign County Municipal Court is the proper forum for this type of action and the Court notes specifically that the City of Urbana is a Home Rule Municipality.

The Court rejects the argument of the Defendants that the issues in the case are moot. A sale was made and it is proper to determine the character of that sale under the Ordinance. The fact that the magazines are not specifically offered for sale today is irrelevant.

The Court believes that this case does not exceed the monetary jurisdiction of the Champaign County Municipal Court. Money damages are not the primary relief

sought in the case. A declaratory judgment is the relief sought and the Court has the authority to deal with that question of relief.

The Court ruled early in the proceedings that even though this is a declaratory judgment action the burden of proof required of Plaintiff is beyond a reasonable doubt. The Court takes that position because of the purpose of the ordinance. The purpose plainly is to determine a community standard and to advise everyone of that standard and to clearly delineate the criminal prosecution that awaits if the community standard is violated. The dissent of Justice Douglas in the case of *Miller vs. California* comments that:

> "if a specific book, play, paper or motion picture has in a civil proceeding been condemned as obscene and review of that finding has been completed, and thereafter a person publishes, shows, or displays that particular book or film, then a vague law has been made specific . . ." But at least a criminal prosecution brought at that juncture would not violate the time-honored void-for-vagueness test."

Justice Douglas, citing the Report of the Commission on Obscenity and Pornography 63 (1970) noted that the declaratory judgment procedure would permit prosecutors to proceed by civil action, rather through (*sic*) the criminal process, against suspected violations of obscenity prohibition. Until civil proceedings declare a particular work obscene, no criminal prosecution should be sustained, since Defendants otherwise would have no fair warning that their conduct was criminal. Such suggested procedure is being followed in this case by the Plaintiff.

In determining community standards, the Court was asked to decide whether the community in question is the municipality of Urbana or the County of Champaign. After reviewing all relevant facts, the Court determined that the community standard is for the community of

Champaign County, Ohio. Champaign County is 432 miles square, contains approximately 34,000 people, with five school districts, one university and one hospital. It is a basic agricultural county with some small industry. The county seat is Urbana with an approximate population of 11,000. Urbana is the center of government of the county and has the only theater and is the site of the one university and only hospital. The county's largest employer is located in Urbana. Although Champaign County has a strong agri-business influence, it is home for many blue collar employees. The western end of the county is dominated by villages with strong rural ties, whereas in the eastern end the villages have stronger ties to the manufacturing business. Each year for one week the Champaign County Fair is held in Urbana bringing all county residents together.

It is significant that the Champaign County Municipal Court has county wide jurisdiction. Further, Champaign County was determined to be the community rather than the City of Urbana because had a jury been impaneled to hear the case, prospective jurors would have been residents from the entire county, not just from the City of Urbana.

The Court weighed all of the testimony presented in the case. A wide range of testimony was presented. The Court believes that the greater weight of the testimony lies with the testimony presented by the City of Urbana. The Plaintiff—City of Urbana's witnesses all testified from their years of association with the community as to community standards. The Defendants' community standard expert was a person with limited contact with the community and in weighing all the testimony, the Court chooses to believe the community standard has been set forth by the witnesses presented by the City. By its findings, the Court does not say that the witnesses for the defense are not proper persons. The Court only says that the weight of the evidence in the opinion of the Court

supports the community standards as set forth by the Plaintiff's witnesses.

The Court notes again that it has made its findings with the burden of proof of beyond a reasonable doubt in order to extend every fairness to the Defendants in this important area of free speech and Constitutional protections that are involved in this case.

The Court devoted great attention to the three pronged test of *Miller vs. California* and applied this test in total to every item charged. The test is:

1. Whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to prurient interest, and
2. Whether the work depicts or describes in a patently offensive way, sexual conduct as has been defined, and
3. Whether the work, taken as a whole, lacks serious literary, artistic, political or social value.

This first branch of *Miller* requires the trier of facts to make a determination of the "average adult" applying contemporary community standards for Champaign County, Ohio. "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City. People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." (*Miller vs. Cailfornia*).

The average adult description is similar to the reasonable man standard. For many years, Courts and lawyers have written millions of words in an effort to define and apply the reasonable man standard. In attempting to make this determination many factors have been taken

into consideration by the Court. The Court considered the testimony of all the witnesses, their interest in the case, the bias, or prejudice, their knowledge on the subject.

It is this Court's finding beyond a reasonable doubt that when considering all the evidence and opinions that this first prong of *Miller* is satisfied as to obscenity and that the average person applying contemporary community standards, would find that the works in question, taken as a whole, appeal to the prurient interest.

The second branch of *Miller* received a great deal of evidentary (*sic*) time. Defense argued under Ohio Law that "penetration" must be present and that it must be actual as distinguished from simulated. The Court rejects this argument. "Explicit" is more appropriate than actual or simulated.

The sexual conduct referred to in the case of *Miller vs. California* is not limited to the narrow definition of sexual conduct for rape purposes as set forth in Section 2907.01 Ohio Revised Code. Sexual conduct referred to in *Miller* is used in reference to a broader definition.

The Court notes specifically that *Miller vs. California* was decided in 1973 and the Ohio Criminal Code definition did not become law until January 1, 1974.

The third test in *Miller* is "whether the work taken as a whole lacks serious literary, artistic, political or scientific value." "At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection. *Miller vs. California.*

Reviewing all the testimony and examining the exhibits the Court finds beyond a reasonable doubt that the five magazine issues in question do not meet the minimum standard stated above in the *Miller* case.

"Of freedom of speech and press the courts must always remain sensitive to any infringement of genuinely serious, literary, artistic, political or scientific expression. This is an area in which there are few eternal verities." *Miller vs. California*, supra.

Attempting to provide positive guidelines the Court acknowledges that "this may not be an easy road, free from difficulty". But no amount of "fatigue" should lead us to adopt a convenient "institutional" rationale—an absolutist, "anything goes" view of the First Amendment—because it will lighten our burdens. "Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees." *Jacobellis vs. Ohio*, 378 US 184.

Freedom is the most valuable asset of this nation, the revolutionary events that led to it, and the documents and institutions that preserve it are the foundation of the United States.

The First Amendment is one such document and its preservation is of paramount concern to this Court. This Court cherishes individual rights and freedoms, however, a freedom cannot be used to protect an illegal and unlawful activity. "Obscenity is not within the area of constitutionally protected speech or press." *Roth vs. United States*, 354 US 476. There are limits and the Court acknowledges the inherent dangers of undertaking to regulate any form of expression. (*Miller vs. California*) Defendants in this case urge the Court to protect their First Amendment rights and permit the sale of certain magazines. The Court cannot protect an unlawful activity and in this instance the Court rules that the sale of the five magazines in Urbana, Ohio, violates the Ordinance No. 133.01 et seq of the City of Urbana pertaining to obscenity. The Court is convinced beyond a reasonable doubt that the five magazines are not protected by the First Amendment of U.S. Constitution. The First Amendment has never been an absolute.

Such finding means that if these magazines are offered for sale in Urbana by anyone, then the seller is subject to criminal prosecution because of the finding of this declaratory judgment action unless the declaratory judgment findings are overturned by a higher court.

The Court notes that its findings about obscenity are made only on the five issues of these five magazines and not to any other publication.

The Court notes for the record that subject to appeal, no further action will be taken by either party in relation to the sale of magazines or criminal prosecutions concerning the sale of such magazines. That agreement of counsel has been in effect since the early stages of this case and will remain based on the agreement of counsel.

APPENDIX G

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS CHAMPAIGN COUNTY MUNICIPAL COURT

* * * *

[363] Q. Okay. Before I get into the videos themselves with respect to second prong of the *Miller* test and respect to these five exhibits, do you have an opinion based on your education, knowledge and experience to reasonable scientific certainty as to whether the exhibits 1 through 5 that you've viewed and described depicts or describes any patently offensive way sexual conduct as defined in the *Miller* second prong test?

MR. PALMER: Objection, Your Honor. Before I would like Attorney Hemm to define for Mr. Scott what he means by sexual conduct.

THE COURT: The Court sustains the objection as [364] to that portion of it. The Doctor must know the definition of sexual conduct.

Q Doctor, are you familiar with the definition of sexual conduct while we're looking?

THE COURT: Legally.

THE WITNESS: I believe that the definition that you read to me this morning that the Court had adopted for this matter.

Q. With respect to the definition it is embodied in the ordinance which is patterned after the State Revised Code, sexual conduct means vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal and anal intercourse.

MR. PALMER: Your Honor, may we approach the bench?

THE Court: Yes. There is more to it than that I think.

MR. HEMM: Sexual conduct.

(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HELD AT THE BENCH:)

MR. PALMER: Your Honor, specifically we would object that that was the only definition we would concur with Mr. Hemm that that is the definition of sexual [365] conduct, but sexual conduct considered as a whole also is considered in your instructions to this Court which I requested. At the time I talked with Mr. Scott and asked him in his deposition if it would be helpful to have what the Court is going to use as the definition of sexual conduct. It includes patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. Includes touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast for the purpose of sexually arousing or gratifying either person. I would ask that Mr. Hemm be instructed to read the total definition of sexual conduct.

THE COURT: The Court agrees, Mr. Hemm.

MR. HEMM: I will do so, Your Honor.

THE COURT: The Court agrees with that. Sustain the objection.

(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT:)

THE COURT: It is going to be read to you.

MR. PALMER: I would not have any objection if Mr. Scott was handed that definition.

THE COURT: Okay.

THE WITNESS: If I may, the Prosecutor pretty [366] well summarized it. I was listening to his comment, too. You're weighing me down here with paper.

THE COURT: It starts out there, Doctor. The middle of page two sexual conduct in the second of the three required elements of the foregoing definition and then goes from there on.

MR. HEMM: Are you familiar with that definition, Doctor?

THE WITNESS: Yes, I am. I've read it before.

Q. With respect to inclusion of that definition, can you answer my previous question as to whether or not you have an opinion?

A. Yes, I do.

THE WITNESS: Could I just get a drink, Judge, please? Could I take a two minute break too?

THE COURT: Why don't we take a break? We will come back and we will pick it up. Everyone needs a break here. We will take ten minutes recess and then we will reconvene immediately.

THE WITNESS: Super.

(WHEREUPON, A RECESS WAS TAKEN.)

THE COURT: I think we needed that break.

MR. HEMM: Your Honor, may we approach the bench?

THE COURT: Sure.

[367] (WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HELD AT THE BENCH:)

MR. KRAMER: We want to make it a part of the record that we are objecting to sexual conduct of that definition.

THE COURT: I'm well aware of that.

MR. KRAMER: We also claim, Your Honor, to ask the question in the alternative. That is, if sexual conduct is defined this way and if it's defined that way.

THE COURT: Okay. No objection. Note their objection to that first definition. Are you going to read it to him?

MR. HEMM: The second question, yes.

THE COURT: Yes. Unless you want to follow along with it.

(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT:)

(Continued by Mr. Hemm:)

Q. You've already read the definition. Do you want me to read it again? Do you need the question asked again or do you recall the question based on my definition? There was some other things put in the sexual conduct definition.

A. Okay.

Q. Do you want me to ask the question?

[368] A. Please.

THE COURT: Do you want to see if the Reporter can pick that back up? It's quite a ways back.

MR. HEMM: I'll restate it.

Q. Do you have an opinion based on your education, knowledge and experience to a reasonable scientific certainty as to whether the exhibits marked 1 through 5 which you've examined depicts or describes patently offensive sexual conduct as defined? Such sexual conduct when considered as a whole means among the following patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. Patently offensive representations of masturbation, excretory function and lewd exhibitions of human genitals. Sexual conduct in the foregoing definition as applies to the materials herein may also mean vaginal intercourse between a male and female and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penertation, however slight, is sufficient to complete vaginal or anal intercourse.

Do you have an opinion based on those definitions?

A. Yes, I do.

MR. PALMER: Again, Your Honor, he might continue reading sexual contact also. That is part of [369] the definition as we understand it.

THE COURT: I'll have to have my notes back. Yes. The Court agrees with Mr. Palmer. You'll have to continue.

Q. Sexual contact means any touching of an erogenous zone of another, including without limitation—

THE COURT: Hold it. He's going to pick it up here.

Q. The thigh, genitals, buttock, pubic region, or, if the person is a female, a breast for the purpose of sexually arousing or gratifying either person.

THE COURT: I think there is one more paragraph. Does that cover it?

MR. PALMER: I would think that would cover it at this stage other than we would make an objection as to Mr. Hemm's using the word magazines taken as a whole. His definition of sexual conduct is correct. We would agree with that, but the words we object to is as taken as a whole.

Q. Did you have an opinion?

A. Yes, I do.

Q. What is that opinion as to the five exhibits?

THE COURT: In light of that definition that he just read.

Q. In light of the definition, that is correct.

[370] THE COURT: You may take all the time you need for that.

MR. HEMM: Your Honor, while he's referring to that as far as the record, I would note our continuing objeciton as to this definition as required by the Court.

THE COURT: Right. I note your objection. Doctor, I'll give you all the time you need.

THE WITNESS: I'm focusing on one thing. I'm not use to that part of the definition.

THE COURT: Right, I understand that. The Court is willing to permit you time to review that. If you need additional time, please take the time you need.

THE WITNESS: I'm trying to be careful before I say anything.

THE COURT: That is fine. The Court understands. Mr. Palmer and Mr. Hemm?

(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HELD AT THE BENCH:)

THE COURT: Mr. Hemm had requested that he also ask the question with the *Miller* definition of sexual conduct.

MR. KRAMER: Not the *Miller*, just the Ohio Revised ordinance definition.

MR. HEMM: Which is a copy from *Miller*.

THE COURT: I'm going to permit that also in [371] the alternative.

MR. PALMER: Then we would like to note our objection to him being able to ask that question.

THE COURT: Okay. I'm going to tell the Doctor that though at this time.

MR. PALMER: That is fine.

(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT:

THE COURT: I need your attention.

THE WITNESS: I have to answer my question in two parts if it's possible. Say for exhibit 2 through 5, in my opinion, they would not be patently offensive.

THE COURT: Two through 5?

THE WITNESS: Given this definition exhibit 1 I do not have an opinion on that.

THE COURT: On exhibit 1, Doctor?

THE WITNESS: Not an opinion sure enough that I could render.

THE COURT: Let me make sure. Exhibits 1, I believe, is *Nugget*?

THE WITNESS: That is correct.

Q. Doctor, with respect to the opinion you have just rendered, have you ever been required to render an opinion based on the instruction that you have been given as to the definitions?

[372] A. No, I have not.

Q. In any of the cases that you've testified in?

A. No, I have not.

Q. Doctor, I'm going to ask you why—Well, let me step back.

In the alternative, Doctor, I'm going to ask you this opinion. Do you have an opinion based on your education, knowledge and experience to a reasonable scientific certainty as to whether exhibits 1 through 5 depict or describes any patently offensive sexual conduct? Sexual conduct having the definition of applies to materials herein may also mean vaginal intercourse between a male and female and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

Do you have an opinion based on that?

A. Yes, I do.

Q. What is that opinion?

A. That they would not be patently offensive.

Q. As to all five of the exhibits?

A. As to all five.

Q. Upon what do you base that opinion?

A. On the contents of the magazines, the lack of sexual conduct as defined in the last definition.

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APPENDIX H

§ 2905.34 Definitions.

As used in sections 2903.13 to 2903.16, inclusive, and sections 2905.34 to 2905.39, inclusive, of the Revised Code:

(A) Any material or performance is "obscene" if, when considered as a whole and judged with reference to ordinary adults, any of the following apply:

(1) Its dominant appeal is to prurient interest;

(2) Its dominant tendency is to arouse lust by displaying or depicting nudity, sexual excitement, or sexual conduct in a way which tends to represent human beings as mere objects of sexual appetite.

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) It contains a series of displays or descriptions of nudity, sexual excitement, sexual conduct, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than for a genuine scientific, educational, sociological, moral, or artistic purpose.

(B) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering or any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

(C) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(D) "Sexual conduct" means masturbation, homosexuality, lesbianism, sadism, masochism, natural or unnatural sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, a breast.

(E) "Material" means any book, pamphlet, ballad, printed paper, phonographic record or tape, motion picture film, print, picture, figure, image, description, or other tangible thing capable of being used to arouse interest through sight, sound, or in any other manner.

(F) "Performance" means any motion picture, preview, play, show, skit, dance, or other exhibition performed before an audience.

HISTORY: 133 v H 84. Eff 9-15-70.